No. 90-589

In The

Supreme Court of the United States

October Term, 1990

BAXTER CHRYSLER PLYMOUTH, INC.,

and

JOHN MARKEL, INC., d/b/a
MARKEL FORD, et al.

and

JOHN KRAFT CHEVROLET, INC.,
d/b/a JOHN KRAFT CHEVROLET-ISUZU, INC.

and

STAN OLSEN PONTIAC, INC.,
d/b/a OLSEN AUTO WORLD and OLSEN FAMILY DISCOUNT CENTER,

Petitioners,

vs.

THE STATE OF IOWA, ex-rel.
THOMAS J. MILLER, Attorney General of Iowa,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

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QUESTIONS PRESENTED

I. WHETHER THE IOWA DISTRICT COURT MAY CONSTITUTIONALLY ASSERT PERSONAL JURISDICTION OVER DEFENDANTS BASED UPON ADVERTISEMENTS PLACED IN A NEBRASKA NEWSPAPER WHICH HAS INCIDENTAL CIRCULATION TO IOWA RESIDENTS

II. WHETHER THE APPLICATION OF IOWA LAW TO NEBRASKA RESIDENTS WHERE NEBRASKA BEARS THE MOST SIGNIFICANT RELATIONSHIP TO THE SUBJECT MATTER OF THE ACTION IS A VIOLATION OF THE FULL FAITH AND CREDIT CLAUSE

III. WHETHER THE REGULATION OF NEBRASKA CREDIT ADVERTISING BY THE STATE OF IOWA IS A VIOLATION OF INTERSTATE COMMERCE

IV. WHETHER CONGRESS HAS PREEMPTED ANY ATTEMPT BY THE STATE OF IOWA TO ALLOW AN ACTION BY THE ATTORNEY GENERAL UNDER ITS TRUTH-IN-LENDING REGULATION WHERE CONGRESS EXPRESSLY PROVIDED THERE SHALL BE NO PRIVATE CAUSE OF ACTION

PARTIES TO THE PROCEEDING

The named appellant in the Supreme Court for the State of Iowa, and the only respondent here is Thomas J. Miller, Attorney General for the State of Iowa.

The named appellees in the Supreme Court for the State of Iowa, and the only petitioners here, are Baxter Chrysler Plymouth, Inc.[1], John Markel Ford, Inc. d/b/a Markel Ford[2], John Kraft Chevrolet, Inc., d/b/a John Kraft Chevrolet-Isuzu, Inc.[3], and Stan Olsen Pontiac, Inc., d/b/a Olsen Auto World[4]. Dean Rawson Nissan, Inc. was dismissed following the decision of the Iowa Supreme Court and therefore is not taking part in this Petition for Writ of Certiorari. The Supreme Court of Iowa affirmed the decision of the Iowa District Court dismissing the individual defendants for lack of personal jurisdiction, but reversed the decision as to the corporate defendants.

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[1] Baxter Chrysler Plymouth, Inc. has no parent companies, subsidiaries or affiliates.

[2] John Markel, Inc. has no parent companies, subsidiaries or affiliates.

[3] John Kraft Chevrolet Geo-Isuzu is an affiliate of John Kraft Chevrolet, Inc.

[4] Olsen Family Discount Center, Metro Motors, Olsen Dodge, Inc. d/b/a Olsen Family Discount Center and Olsen Auto World are affiliates of Stan Olsen Pontiac, Inc.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Iowa, entered May 23, 1990, and on which rehearing was denied June 20, 1990.

OPINIONS BELOW

The opinion of the Supreme Court of Iowa, No. 83/89-680, dated May 23, 1990 is attached as Appendix A.

Attached as Appendix B is the Order of the Supreme Court of Iowa, dated June 20, 1990 overruling Petitioner's Petition for Rehearing.

Attached as Appendix C is the order of the United States District Court for the Southern District of Iowa, Western Division dated July 13, 1988.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the First and Fourteenth Amendments and Article I, Section 8, Clause 3, and Article IV, Section 1 of the Constitution of the United States.

2. This case involves the following provisions of Federal Law.

15 U.S.C. § 1662. *Advertising of downpayments and installments.*

No advertisement to aid, promote, or assist directly or indirectly any extension of consumer credit may state:

(1) that a specific periodic consumer credit amount or installment can be arranged, unless the creditor usually and customarily arranges credit payments or installments for that period and in that amount.

(2) that a specified downpayment is required in connection with any extension of consumer credit, unless the creditor usually and customarily arranges downpayments in that amount.

May 29, 1968, 82 Stat. 158.

15 U.S.C. § 1664. *Advertising of credit other than open end plans.*

Exclusion of open end credit plans

(a) Except as otherwise provided in subsection (b) of this section, this section applies to any advertisement to aid, promote, or assist directly or indirectly any consumer credit sale, loan, or other extension of credit subject to the provisions of this subchapter, other than an open end credit plan.

Advertisements of residential real estate

(b) The provisions of this section do not apply to advertisements of residential real estate except to the extent that the Board may by regulation require.

Rate of finance charge expressed as annual percentage rate

(c) If any advertisement to which this section applies states the rate of a finance charge, the advertisement shall state the rate of that charge expressed as an annual percentage rate.

Requisite disclosures in advertisement

(d) If any advertisement to which this section applies states the amount of the downpayment, if any, the amount of any installment payment, the dollar amount of any finance charge, or the number of installments or the period of repayment, then the advertisement shall state all of the following items:

(1) The downpayment, if any.
(2) The terms of repayment.
(3) The rate of the finance charge expressed as an annual percentage rate.

May 29, 1968, 82 Stat. 158; Pub. L. 96-221, Title VI, § 619(b), Mar. 31, 1980, 94 Stat. 183.

15 U.S.C. § 1667. *Definitions.*

For purposes of this part –

(1) The term "consumer lease" means a contract in the form of a lease or bailment for the use of personal property by a natural person for a period of time exceeding four months, and for a total contractual obligation not exceeding $25,000, primarily for personal, family, or household purposes, whether or not the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease, except that such term shall not include any credit sale as defined in section 1602(g) of this title. Such term does not include a lease for agricultural, business, or commercial purposes, or to a government or governmental agency or instrumentality, or to an organization.

(2) The term "lessee" means a natural person who leases or is offered a consumer lease.

(3) The term "lessor" means a person who is regularly engaged in leasing, offering to lease, or arranging to lease under a consumer lease.

(4) The term "personal property" means any property which is not real property under the laws of the State where situated at the time offered or otherwise made available for lease.

(5) The terms "security" and "security interest" mean any interest in property which secures payment or performance of an obligation.

Added Pub. L. 94-240, § 3, Mar. 23, 1976, 90 Stat. 257.

3. This case involves the following provisions of state law.

Iowa Code § 714.16

Iowa Consumer Credit Code § 537.1201

Iowa Consumer Credit Code § 537.1203

Iowa Consumer Credit Code § 537.3209

Iowa Consumer Credit Code § 537.6103

Iowa Consumer Credit Code § 537.6104

Iowa Consumer Credit Code § 537.6110

Iowa Consumer Credit Code § 537.6112

Iowa Consumer Credit Code § 537.6113

The text of these statutes is set forth in App. E, p. 37a.

Nebraska Revised Statutes, § 60-1411.03 (Reissue 1984) The text of this statute is set forth in App. F, p. 56a.

STATEMENT OF THE CASE

Markel Ford, John Kraft Chevrolet-Isuzu, Olsen Auto World, and Olsen Family Discount Center, (hereinafter "Dealers") are automobile dealerships located in Omaha, Nebraska. The Dealers placed advertisements in the *Omaha World Herald*,, a Nebraska newspaper. The Iowa Attorney General filed suit against the Dealers alleging false advertising under the Iowa Consumer Fraud Act, the Iowa Consumer Credit Code, and the Federal Truth-in-Lending Act.

The State maintained the advertising placed in the *Omaha World Herald* was false and misleading. The Dealers objected maintaining the ads fully complied with Nebraska law and received approval by the Nebraska Attorney General.

The suit was originally filed in the Iowa District Court for Pottawattamie County. Thereafter, the Dealers filed a removal petition in the United States District Court for the District of Iowa – Western Division, and immediately filed a motion to dismiss for lack of personal jurisdiction. The State in turn responded with a motion to remand for lack of subject matter jurisdiction.

The Honorable Donald E. O'Brien, United States District Court Judge, in an order dated July 12, 1988 granted the State's motion for remand finding a lack of subject matter jurisdiction existed, but not without opinion concerning the State's attempted action vis-a-vis federal law. Thereafter, the Dealers filed a Motion to Reconsider the Court's order of July 12, 1988. Judge O'Brien sustained and re-adopted the previous order with clarification in an order dated December 23, 1988 which is attached hereto as App. C, p. 20a.

Upon remand, the Dealers filed their Motion to Dismiss with the Iowa District Court for Pottawatamie County. Following oral argument, the Iowa District Court then granted the Dealers' Motion to Dismiss for Lack of Personal and Subject Matter Jurisdiction and Failure to State a Claim Upon

Which Relief May be Granted in its opinion dated April 6, 1989. The opinion of the Iowa District Court is attached hereto as App. D, p. 33a. The Iowa District Court determined that the Dealers lacked the necessary minimum contacts with the forum state as the circulation of the newspaper into Iowa constituted less that 2% of the total circulation and therefore an Iowa court could not constitutionally assert personal jurisdiction over the non-resident Dealers. This decision was based on the fact that the Dealers do not engage in any business in the State of Iowa. The District Court specifically found that any advertisements placed in the *Omaha World Herald* which happened to reach Iowa residents were incidental in nature, the Dealers had no control over the newspaper's distribution, and it was therefore insufficient to support the exercise of jurisdiction over these non-resident Defendants. (App. D, p. 35a)

The Attorney General of the State of Iowa (hereinafter "State of Iowa") appealed the order of the trial court to the Iowa Supreme Court. The Iowa Supreme Court affirmed the decision of the trial court dismissing the action for lack of personal jurisdiction as to the individual Dealers, but reversed the decision as to the corporate Dealers. Petitioners' Motion for Rehearing was denied June 22, 1990. Following the decision of the Iowa Supreme Court, a fifth defendant, Dean Rawson Nissan, Inc., withdrew from the lawsuit leaving four remaining corporate defendants to take part in this Petition for Certiorari.

REASONS FOR GRANTING WRIT

I. THE DECISION OF THE IOWA SUPREME COURT FINDING PERSONAL JURISDICTION EXISTS OVER PETITIONERS BASED UPON INCIDENTAL CONTACT WITH THE FORUM STATE IS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND DIRECTLY CONTRARY TO THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES, FEDERAL COURTS, AND THE HIGHEST COURTS OF OTHER STATES.

"Jurisdiction under rule 56.2 [Iowa's long-arm statute] is coextensive with what is permitted by the due process clause

of U.S. Const. amend. XIV . . . [t]herefore, the only relevant issue is whether . . . personal jurisdiction over the non-resident defendant is consistent with due process." *Al-Jon, Inc. v. Garden Street Iron & Metal*, 301 N.W.2d 709, 711 (Iowa 1981). Any inquiry into whether a court has personal jurisdiction over the defendant must focus upon the extent of the contact by the defendant with the forum state. Due process requires minimum contact, the nature of which is such that "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' ". *International Shoe Company v. Washington*, 326 U.S. 310, 316 (1945). It is the plaintiff's burden to plead and prove that such contacts exist. *Institutional Food and Marketing Associates, Ltd. v. Golden State Strawberries, Inc.*, 747 F.2d 971, 972 (8th Cir. 1984).

In making the due process inquiry, the Supreme Court of Iowa has stated that "[w]e apply the above standard [minimum contacts test] in light of five factors the Court of Appeals for the Eighth Circuit has distilled from adjudicated cases, the first three being the most important." *Larsen v. Scholl*, 296 N.W.2d 785, 788 (Iowa 1980).

Because due process is infringed unless the Dealers have had sufficient minimum contacts with Iowa, we must determine whether the contacts were sufficient in the present facts. In doing so, we consider the following five factors:

(1) the quantity of the contacts;

(2) the nature and quality of the contacts;

(3) the source and connection of the cause of action with those contacts;

(4) the interest of the forum state; and

(5) the convenience of the parties.

See Caesar's World, Inc. v. Spencer Foods, Inc., 498 F.2d 1176, 1180 (8th Cir. 1974) . . .

Recognizing that the Iowa Supreme Court has previously concluded that its long-arm statute confers jurisdiction "to the fullest extent permissible under the Due Process Clause of the Fourteenth Amendment", *Larsen v. Scholl*, 296 N.W.2d 785, 788 (Iowa 1980), it remains clear that the attempt to establish

jurisdiction by the Attorney General in this case extends beyond the reach of the Constitution of the United States. The due process clause, acting as an instrument of interstate federalism, may act to deprive the state of its power to render judgment. *World-Wide Volkswagen Corporation v. Woodson*, 444 U.S. 286, 294 (1980).

In *World-Wide Volkswagen*, this Court considered the issue of personal jurisdiction over car dealers, distributors, and manufacturers. The court found a New York car dealer was not subject to jurisdiction. The issue then turned to the question of whether there was jurisdiction over the manufacturer or distributor. The car dealer in *World-Wide Volkswagen* was excluded from jurisdiction because the dealer carried on no activity in the forum state whatsoever. The Court stated as to the dealer that "we find in the record before us a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction." *Id.* at 295. However, as to the manufacturer, the court stated that:

> if the sale of a product of a *manufacturer* or *distributor* such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.
>
> *Id.* at 297. (Emphasis added).

The present action is being asserted against four different car dealers, each of which is approximately ten miles from the Iowa border. None of the Dealers could be characterized as a manufacturer or distributor. Each dealer is simply one of many dealers in the various types of automobiles. For example, in the Omaha area there are approximately five Ford dealers, six Chevrolet dealers, and four Nissan dealers. Perhaps double that number of dealers, some over fifty miles away from Iowa, also advertise in the Omaha paper. Each of these dealers is but one small retailer among many, and should not be held accountable under the same standards as a large manufacturer or distributor.

This Court has carefully laid out the approach to be used in determining whether the assertion of personal jurisdiction in any given case is in accord with the requirements of due process. The "minimum contacts" analysis was first set forth in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). This approach has been reaffirmed and clarified by this Court in subsequent cases such as *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980); *Helicopteros Nacionales v. Hall*, 466 U.S. 408 (1984); *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984); and *Burger King v. Rudzewicz*, 471 U.S. 770 (1984); *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987).

However, there appears to be a need for further guidance from the Supreme Court. A number of state and federal courts have found the assertion of personal jurisdiction to be proper in instances where such assertion is in violation of the constitutional standards promulgated by this Court. The present case affords a unique opportunity for this Court to clarify what minimum contacts will support the exercise of jurisdiction over non-resident defendants. This case is an attempt by the Iowa Attorney General to impose Iowa law against Nebraska retailers who advertise their product in a Nebraska newspaper, which ads comply with both Nebraska and federal law. Consequently, the decision of the Iowa Supreme Court that personal jurisdiction over the corporate defendants is proper is in violation of the Dealers' Fourteenth Amendment Due Process rights and contrary to the decisions of the Supreme Court of the United States.

A. THE QUANTITY OF CONTACTS BETWEEN DEFENDANT AND THE STATE OF IOWA IS INSIGNIFICANT

Despite the assertion of the State of Iowa that petitioners place "almost daily" advertisements in the *Omaha World Herald* (which may, incidentally, reach Iowa residents) the petition merely cites 20 advertisements by Markel Ford, for example, over a nine-month period and advertisements on a Nebraska television station as the basis for jurisdiction. Council Bluffs is the only Iowa city of any size near Omaha, where

the Dealers are located. The petitions are attached hereto as Appendices G, H, I, and J.[1] Allegations that Iowa residents may have purchased a motor vehicle from any of the Dealers in Omaha are not relevant to any inquiry involving personal jurisdiction. It is the Dealers' own contact with the forum state which is at issue, not the extent of any contact by Iowa residents with the Dealers. *Aaron Ferrer & Sons v. Diversified Metal Corporation*, 564 F.2d 1211, 1215 (8th Cir. 1977); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

In accordance with the Eighth Circuit's test which is based upon the standards set forth by this Court, the essential element attendant to due process analysis is whether the defendant has "purposefully availed" himself of the privilege of conducting business in the State of Iowa. *Aaron Ferrer*, 564 F.2d 1211, 1215; *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980).

In this case, respondent would have the Court find purposeful availment only from incidental advertisement. It is not alleged:

1. That the Dealers maintain places of business or employ, or own realty in the State of Iowa;

2. That any contracts for the sale of automobiles are made in the State of Iowa;

3. That the Dealers have ever done business in Iowa or even ship, transfer or deliver cars into the State of Iowa;

4. That the Dealers advertise the sale of motor vehicles in any Iowa newspaper or radio station;

5. That the Dealers' advertisements are calculated to reach the Iowa market (only that Iowa residents may happen to purchase cars in Nebraska).

With his brief filed in the Iowa District Court, Respondent included an affidavit which states that there are 5,700 Sunday *Omaha World Herald* and 3,700 daily *Omaha World Herald* paid subscriptions in Council Bluffs. This affidavit is

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[1] Only one set of the Dealers ads, attached to the Baxter Chrysler Plymouth Petition is provided for the sake of brevity.

attached hereto as App. K p. 121a. Yet as represented by the *World Herald*, those totals are from an aggregate paid circulation which in November of 1987, was 301,916 Sunday *World Herald* and 224,269 daily *World Herald* newspapers. See App. K, p. 121a. In other words, 1.68% and 1.8%, respectively, of all newspapers circulated by the *Omaha World Herald* are distributed on a daily or Sunday basis into Council Bluffs. Indeed, because of the policy of the *Omaha World Herald*, it is impossible to prevent newspaper advertisements which are directed to the Omaha market from being circulated into Council Bluffs. In addition, due to cost factors, all advertisements are included in each edition of the *Omaha World Herald*, including those areas outside of the World Herald designated "Metro" area (Douglas and Sarpy Counties in Nebraska and Council Bluffs in Iowa). Although not alleged in his petition, Respondent's affidavit also states that two of the Dealers have listings in the Council Bluffs' telephone book. These listings are also not the result of any purposeful conduct on the part of the Dealers, but are placed by the national manufacturers such as Chrysler or Ford.

The numbers previously cited show the quantity of contacts is minimal. It is clear then that the Dealers' advertisements do not constitute "purposeful availment" for purposes of permitting the assertion of Iowa jurisdiction. Respondent merely relies upon two cases, *Gunner v. Elmwood Dodge, Inc.*, 506 N.E.2d 175 (Mass. 1987), and *Ex parte Chevrolet, Inc. (Re Emmie Wallace v. Pope Chevrolet, Inc., et al.)*, 555 So.2d 109 (Ala. 1989) for the proposition that such limited contact as that of the Dealers is sufficient to satisfy the minimum contacts test. However, both of these cases are inconsistent with holdings of the Supreme Court of the United States as well as various federal court decisions which are cited herein.

In *Gunner*, the Massachusetts Appeals Court concluded that a non-resident's "persistent" advertising campaign aimed at a market target in the forum state conferred long-arm jurisdiction. It was because of those contacts that the Massachusetts Court determined that the defendant was making an "additional effort to develop a Massachusetts market." The

court was quick to point out that had the advertisements been limited to those contained in a foreign newspaper and on a foreign television station, they might well have been considered "incidental contacts" for purposes of jurisdiction. Those cases reaching a different conclusion were distinguished by the *Gunner* court; each of which involved advertisement limited to media published or broadcasted outside of the forum state, just like the facts of the case at bar.

In *Pope Chevrolet*, the Supreme Court of Alabama held that a Georgia car dealer had sufficient minimum contacts with the State of Alabama to be subject to the personal jurisdiction of the Alabama state courts. The *Pope Chevrolet* case involved a suit instituted by an Alabama resident based upon fraud and breach of contract related to her purchase of a truck from the dealer. Plainly put, *Pope Chevrolet* suggests Atlanta newspapers and television stations will allow residents of four nearby states to sue in their forum if they receive this Atlanta newspaper. In this case there is no such injury, thus, the interest of Iowa in pursuing this action is much more limited than in *Pope Chevrolet*. *See* Argument "E," *infra*.

More appropriate to this Court's review is the analysis of *Herman Miller, Inc. v. MR Rents, Inc.*, 545 F. Supp. 1241, 1245 (W.D. Mich., 1982) which recognized that advertisements similar to those of Petitioners are merely incidental and not adequate to afford long-arm jurisdiction.

Herman Miller, Inc., was an action brought pursuant to Federal Trademark laws and state law. Plaintiff alleged that the defendant's advertising and selling constituted unfair competition and false advertisement and was contrary to Michigan law. The defendant filed a motion to dismiss for lack of personal jurisdiction.

The *Herman Miller* court denied jurisdiction. Defendant was an Illinois corporation with its sole place of business in Chicago. Plaintiff asserted that the defendant's infringement caused a tort action to occur in Michigan because of advertisements placed in the *Chicago Sun Times*, the *Chicago Tribune* and the *Chicago Magazine*. (The *Omaha World Herald* distributions in Iowa are also analogous.) The Michigan

paid circulation of the Chicago newspaper constituted 1.23% of their total daily circulation and 1.67% of their total Sunday circulation. In addition, *Chicago Magazine* had an average Michigan circulation of .87% of the total circulation (the Iowa circulation of the *Omaha World Herald* is less than 2% of the total circulation). Speaking for the Western District of Michigan, Judge Gibson held that such advertisement did not constitute a "purposeful availment", stating that:

> It would not be reasonable to require the defendant to defend in Michigan based on this limited Michigan circulation of Chicago area publications even if it is assumed that the offending advertisement appeared in each publication on a regular basis. . . . *the incidental circulation is far too tenuous a connection with Michigan to be the basis for personal jurisdiction.* (emphasis supplied)
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> *Id.* at 1245.

The lack of sufficient minimum contacts between Petitioners and Iowa precludes any finding of "purposeful availment" and accordingly the courts of Iowa may not constitutionally exercise personal jurisdiction in this case.

B. THE NATURE AND QUALITY OF THE DEALERS' CONTACTS WITH IOWA ARE INSIGNIFICANT AND THEREFORE INSUFFICIENT MINIMUM CONTACTS TO PROVIDE PERSONAL JURISDICTION OVER DEFENDANTS.

Petitioners are Nebraska corporations with their principal places of business in Omaha, Nebraska. There are no allegations that a sale or lease has been made in Iowa. It is suggested that Iowa residents from time to time may come to the Dealers in Omaha for the purpose of buying or leasing a car. However, it is well settled that "[u]nilateral acts by plaintiff alone will not suffice to bring a nonresident defendant within the personal jurisdiction of the forum state." *Hanson v. Denckla*, 357 U.S. 235, 250-54 (1958); *Tung v. American University of the Caribbean*, 353 N.W.2d 869, 871 (Iowa App. 1984).

In *Wines v. Lake Havasu Boat Manufacturing, Inc.*, 846 F.2d 40 (8th Cir. 1988) the buyers of boats sued the Arizona boat manufacturer for breach of warranties in Minnesota. The Circuit Court in holding that personal jurisdiction did not exist stated:

> "[t]he Due Process Clause ensures that a nonresident 'will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person.' " *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 . . . *See also Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 . . . (1984).

Id. at 42.

The Eighth Circuit applied the same five part test that is used by the courts of Iowa for determining whether minimum contacts exist.

> The sole contact between Lake Havasu, this lawsuit, and Minnesota is Lake Havasu's advertising of its product in a nationally distributed trade publication which is circulated in Minnesota. It does not appear from the record, however, that Lake Havasu's advertising represents a purposeful availment of the benefits and protections of Minnesota law . . . Accordingly, Minnesota can not constitutionally assert jurisdiction on the basis of this advertising.

Id. at 43.

In *Golden State Strawberries*, 747 F.2d 448 (8th Cir. 1984), the Eighth Circuit noted that Missouri courts had interpreted its long-arm statute in a manner similar to that of Iowa. Nevertheless, the Circuit Court concluded that there were inadequate contacts by the defendant with the state to permit jurisdiction. The court observed that the defendant did not conduct business in Missouri. The defendant's involvement in Missouri was limited to phone conversations with and written correspondence to the plaintiffs. The court held that these "contacts" were not sufficient under the due process clause to justify an exercise of personal jurisdiction over the defendant.

In *Mountaire Feeds, Inc. v. Agro Impex S.A.*, 677 F.2d 651 (8th Cir. 1982) similar facts were addressed. The Eighth Circuit affirmed the decision of the district court granting the defendant's motion to dismiss for lack of personal jurisdiction. The plaintiff asserted that the defendant had sufficient minimum contacts with the forum state of Arkansas based upon the parties' extensive use of the facilities of interstate commerce such as the telephone and mail.

The Eighth Circuit found that "the use of arteries of interstate mail telephone, railway and banking facilities is insufficient, standing alone, to satisfy due process." *Id.* at 655. The court noted that the defendant did not maintain an office in Arkansas, nor did any sales representative or other employee ever enter Arkansas in connection with the sales contract.

Solicitation of business alone by happenstance in an adjoining state has never been viewed as sufficient contact to sustain the exercise of personal jurisdiction. It certainly should not be so viewed in this action where the Dealers have not transacted any business within the State of Iowa, nor is it even alleged that they entered into any contracts with an Iowa resident.

In *Cox Enterprises, Inc. v. Holt*, 678 F.2d 936 (11th Cir. 1982) a decision that cannot be reconciled with *Pope Chevrolet*, the court held that a Georgia newspaper which leased a room in Alabama as a drop point for independent distributors and an undetermined number of coin vending machines had not established minimum contacts for purposes of personal jurisdiction in Alabama.

The court held that the distribution was incidental and not a part of the paper's primary circulation area stating, " . . . [t]here is no evidence of an effort to exploit or penetrate the state market beyond making the paper available to a few readers in the state who have an interest in it . . . " *Id.* at 939. In this case, unlike the newspaper which was the primary publisher in *Cox*, the Dealers maintain absolutely no business enterprise or connection in Iowa.

In *Berks v. Red Mountain Ski Corporation*, 571 F. Supp. 500 (N.D. Ill. 1983) the parent of a child injured while skiing

at a Wisconsin ski resort attempted to bring a negligence action in Illinois against the resort. The court dismissed the case for lack of personal jurisdiction.

In *Berks* the ski resort's advertising contacts were more than mere incidental advertising in a foreign state. The ski resort maintained a booth at the 1982 Chicago Ski and Winter Show in Illinois, placed ads in an Illinois newspaper, broadcast its ski conditions on Illinois radio stations, and placed circulars in Illinois ski shops. These activities extend well beyond the barest of "contact" by the Dealers, yet jurisdiction was denied to an individual with a very real and personal injury.

It is inconceivable that an Iowa legislator could be allowed to dictate to a Nebraska corporation the content of ads placed by him in a Nebraska newspaper because an Iowan might see or respond to the ad. Under that theory, advertisers in the *Los Angeles Times* or the *New York Times* could be subject to the personal jurisdiction of every state. Such newspapers are widely distributed at newsstands all over the country, yet the advertisers do not place their ads with the intent to solicit business from anywhere but their locality. This is in contrast to other publications such as *USA Today* which are geared toward national distribution. In such publications it is common to find advertisers who do indeed intend to solicit business wherever the paper may be circulated. Such advertisements involve telephone services or computer products of national chains, but not local automobile dealerships. A car dealership is a business which is very local in nature. A Nebraskan who happens to see an advertisement for a car dealership in the *New York Times* is highly unlikely to travel to New York for the purpose of buying a car. The dealer expects only to solicit business in his vicinity, and certainly not to be held accountable for a speculative violation of another state's law, particularly when he is in compliance with his own state's laws.

C. THE RELATION OF THE CAUSE OF ACTION AGAINST DEFENDANTS HAS NOTHING TO DO WITH THE ALLEGED IOWA CONTACTS VIA THE OMAHA WORLD HERALD.

The respondent has argued that there is a direct connection between the cause of action and Petitioners' conduct and has discounted "newspaper" cases such as *Cox Enterprises, Inc. v. Holt*, 678 F.2d 936 (4th Cir. 1982). Nonetheless, the facts of this case warrant reliance on such case law.

The alleged contacts with the State are not a result of the Dealers' calculated attempts to reach the Iowa market, but that of the *Omaha World Herald*. The State argues that it is foreseeable that this Nebraska newspaper will reach a minute portion of the Iowa market and cites *World-Wide Volkswagen*, (444 U.S. 206) in support of the 'foreseeability' test. "Yet 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process clause." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980); *Smalley v. Dewberry*, 379 N.W.2d 922, 923 (Iowa 1986).

In addition to foreseeability, there must be some action on the part of defendant by which it "purposefully avails itself of the privilege of conducting activities in the forum state." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

The Iowa Supreme Court's opinion in this case indicates the courts of Iowa persist in following a "stream of commerce" approach to the minimum contacts test. However, this approach has been specifically rejected by the United States Supreme Court in *World-Wide Volkswagen Corporation v. Woodson*, 444 U.S. 286 (1980) and *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987).

In *Svendson v. Questor*, 304 N.W.2d 428 (Iowa 1981), the Supreme Court of Iowa held that it had personal jurisdiction over a nonresident defendant who had placed a defective pool table into the stream of commerce. The court stated that "[i]t is generally accepted that when a manufacturer voluntarily places his product in the stream of commerce, the constitutional requirement of minimum contacts will be satisfied in

all states where the manufacturer can foresee that the product will be marketed." *Id.* at 431.

However, in *World-Wide Volkswagen*, this Court rejected the above approach and stated that

> the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.

Id. at 297. Thus, it was clearly wrong for the Iowa Supreme Court to base its opinion upon its holding in *Svendson* which applied an erroneous test in determining whether minimum contacts exist.

Any assertion of personal jurisdiction based upon such minimal contact as incidental circulation of an advertisement is contrary to the principle of due process and is unconstitutional. Construing personal jurisdiction as broadly as was done in *Svendson* is contrary to current Eighth Circuit holdings and contravenes due process guarantees recognized by this Court as well.

D. INCONVENIENCE TO DEFENDANTS IS GREATER THAN TO PLAINTIFF

Respondent has argued that the nonresident Dealers are not inconvenienced by having to defend this action in Pottawattamie County, Iowa. However, the truth of the matter is that they are greatly hardshipped by the maintenance of this matter in Iowa District Court. In order to defend this matter the Dealers initially sought advice of their Nebraska counsel. Indeed, this action was removed to federal court and pursued vigorously prior to remand. Now, however, in order for local Nebraska counsel to diligently continue its representation of their clients, local Iowa counsel must be retained by Iowa law. Travel from western Douglas County to Iowa to litigate this matter should not be understated. This action has therefore subjected petitioners to a double hardship. In addition, the test of jurisdiction based on the ads must take into account the fact that retailers much further into Nebraska make use of

the *Omaha World Herald* and would be required to travel hundreds of miles to defend a suit.

In addition to the above-mentioned inconvenience, Petitioner would simply refer the Court to arguments "E" and "II.", infra, with respect to the significant hardships faced due to the greater interests of Nebraskans and the problems faced by Nebraskans due to conflicts of laws with Iowa and Nebraska's most significant relationship to the subject matter of this action.

E. THE INTERESTS OF IOWA IN ALLOWING THIS CAUSE OF ACTION ARE MINIMAL IN COMPARISON TO THE FIRST AMENDMENT, DUE PROCESS, EQUAL PROTECTION, AND COMMERCE INTERESTS OF NEBRASKANS

Any coincidental impact the Attorney General receives by the indirect exposure of its residents to a Nebraska publication is greatly outweighed by the direct chilling effect which would impact commerce and freedom of the press in Nebraska. As mentioned, Respondent has yet to produce one injured party allegedly deceived by advertisements in the *Omaha World Herald.* On the other hand, there is no question what impact an adverse ruling would have upon Omaha car dealers and an Omaha newspaper which would be forced to alter their Nebraska advertising to placate the Iowa Attorney General. This of course is absurd.

In *Cox Enterprises, Inc. v. Holt,* 678 F.2d 936 (11th Cir. 1982) that court noted that stricter scrutiny is mandated where, as here, a newspaper is involved.

> First amendment considerations . . . require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity . . . an expansion of jurisdiction to the limits permitted by due process in other types of cases would tend to have a "chilling" effect on the press because publishers would hesitate to distribute their newspapers in any areas other than those of their major circulation.

578 F.2d at 937-938.

The above rationale explains precisely the interests at stake here. If this case is not dismissed, Petitioners, who relied on the *World Herald*'s scrutiny of its ads may file a third-party claim for partial or full indemnity against the newspaper. The Respondent's argument suggests the Court has jurisdiction over the newspaper's customers even though it may not have jurisdiction over a necessary party. Interstate commerce concerns outweigh any state interest. The chilling effect alone that exercise of personal jurisdiction in this case would have greatly outweighed any alleged State of Iowa interest.

II. THE STATE OF IOWA MAY NOT SEEK TO APPLY IOWA LAW TO THE NEBRASKA DEALERS AS NEBRASKA BEARS THE MOST SIGNIFICANT RELATIONSHIP TO THE SUBJECT MATTER

Under the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, the State of Iowa must give full faith and credit to the Nebraska statute which governs the advertising of motor vehicles for sale or lease. The Nebraska statute is attached hereto as App. F, p. 56a. However, the State of Iowa seeks to apply its own legislation, which is in conflict with that of Nebraska, to Nebraska residents.

As stated by the Supreme Court in *Pacific Employers Insurance Co. v. Industrial Accident Commission*, 306 U.S. 493 (1939),

> [f]ull faith and credit does not here enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it.
>
> *Id.* at 494.

It is clear that the State of Iowa is seeking to project its laws across its borders into Nebraska. The Dealers obtained the opinion of the Attorney General of the State of *Nebraska* regarding their advertisements placed in the *Omaha World Herald*, a *Nebraska* newspaper. In the attorney general's opinion, the ads of the *Nebraska* car dealers were proper under *Nebraska* law. Yet, in the present action, the State of Iowa

seeks to apply Iowa law to these advertisements and hold them violative of Iowa law. It is clear from the holdings of this Court that the State of Iowa has no such power. *See e.g., Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430 (1943) ("Texas is without power to give extraterritorial effect to its laws.")

Where, as here, there is a conflict between the laws of two states, the courts of Iowa have adopted the approach of the Restatement (Second) of Conflict of Laws, § 6. Under this approach, the court will apply the law of the jurisdiction which has the "most significant relationship" to the issue presented. *Lindstrom v. Aetna Life Insurance, Co.,* 203 N.W.2d 623 (Iowa 1973).

As argued previously in this Petition, the State of Iowa has no significant interest in the maintenance of the present action. The State of Iowa has not produced a single individual that has been injured as a result of the Dealers' advertisements. However, the interests of the State of Nebraska are overwhelming. It would be extremely burdensome to force Nebraska retailers to comply not only with the laws of their state, but with those of Iowa as well. If this were held to be the case, Nebraska retailers could be held to be subject to the laws of any state where a copy of the *Omaha World Herald* happened to come to rest. Viewing the impact the Iowa Supreme Court's decision will have upon Nebraska's laws, commerce, and the constitutional guarantees of Nebraskans, it is clear that Nebraska has the "most significant relationship" to the subject matter of this action.

III. THE STATE COURTS OF IOWA LACK SUBJECT MATTER JURISDICTION OVER THIS ACTION

A. REGULATION OF NEBRASKA CREDIT ADVERTISING BY THE IOWA ATTORNEY GENERAL VIOLATES INTERSTATE COMMERCE

The Iowa Attorney General is without authority to dictate to a Nebraska business the manner in which it engages in interstate commerce. It is generally accepted that a state may

constitutionally impose burdens on such commerce only if the following criteria are met:

> 1. There is sufficient local interest in the matter being regulated and the regulation is a *reasonable* exercise of its police power;
>
> 2. There is no discrimination against interstate commerce; and
>
> 3. There is no disruption of any required uniformity in the regulation of interstate commerce.

Head v. New Mexico Examiners, 374 U.S. 424 (1963).

Advertising regulation has always been held to be unconstitutional when applied to interstate commerce in those areas where it represented an unreasonable interference with interstate commerce because of the need for uniform regulation. *Aldens v. Israel Packell*, 524 F.2d 38 (3d Cir. 1975) discussed the principles to be applied where there were conflicts between local and national interests. The Court went on to hold that the state's power to regulate interstate commerce was limited if:

> (1) the matter is one in which Congress had made its own choice of law; or
>
> (2) the area is one in which Congress has made no specific choice of law but
>
> (a) despite this inaction by Congress, the nature of the subject matter require[d] a uniform national rule, or
>
> (b) the choice of law made by the state discriminates against persons engaged in interstate commerce in favor of local interests, or
>
> (c) a non-discriminatory state choice of law, in an area where national uniformity not be essential, imposes a burden on interstate commerce in excess of any value attaching to the state's interest in imposing its regulation.

Id. at 45-46.

The court concluded that the national interest in the free movement of money, credit, goods and services outweighed

the valid local interest in restricting maximum interest rates on consumer loans and setting uniform contract rates for such transactions.

The *Aldens v. Israel Packell* interpretation was accepted by the Southern District of Iowa, Central Division in *Aldens Inc. v. Thomas J. Miller*, 466 F. Supp. 379 (1979). However, in that case too, the validity of the Iowa Consumer Fraud Act was construed only in relation to the state's regulation of usurious interest rates, the sole matter deferred to state regulation to by Congress in adoption of the Truth-in-Lending Act. (15 U.S.C. 1610(b)).

There is, however, no such deferral in the regulation of advertisement of matters governed by the Federal Truth-in-Lending Act. The attempted enforcement of state law against businesses engaged in interstate commerce is thus usurped by the Truth-in-Lending Act in matters of advertisement. The Truth-in-Lending Act is an expression of the need for the uniformity on such matters by the Act in such a manner to preclude local legislative pronouncements inconsistent with that Act.

B. CONGRESS HAS PREEMPTED STATE REGULATION OF CREDIT ADVERTISING THROUGH THE FEDERAL TRUTH IN LENDING ACT AND HAS FORECLOSED PRIVATE CIVIL RELIEF

As the Iowa Federal court noted in its opinion (attached hereto as App. C, p. 20a), the United States Supreme Court is using two different tests to determine federal question jurisdiction, the "Holmes approach", *Merrill Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986) and the "Brennan approach" of *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988).

Beginning with the analysis of *Merrill Dow Pharmaceuticals, Inc. v. Thompson*, petitioners were found to have improperly removed their cause to federal court. The crux of that court's determination was that presumably congress had determined no federal remedy should be afforded private citizens. Thus the matter lacked the requisite "substantial

element" to the cause of action necessary to invoke federal question jurisdiction. The case at bar is sufficiently distinct from *Thompson* to grant this court federal question jurisdiction.

First of all, there was no question that diversity existed. Secondly, only one of six counts present in the *Thompson* decision even involved a federal act (FDCA). Here, however, the *entire* complaint is based solely upon the Federal Truth in Lending Act ("TILA") and upon the purported allowance of Iowa's enforcement of the TILA.

The *Thompson* court in affirming the decision of the Sixth Circuit, concluded that since a jury could find a *violation* by defendants *not* based on federal law (as opposed to a *remedy* for plaintiffs *based* on federal law), plaintiff's causes of action did not depend entirely upon a question of federal law. Further, the *Thompson* court noted "the vast majority of cases brought under the general federal-question jurisdiction of the federal courts are those in which federal law creates the cause of action." *Thompson*, 478 U.S. at 808.

As the Iowa federal court noted, the purpose of Congress in enacting the TILA was to give certain private citizens relief in federal court for certain portions of the TILA. The court cited *Utley v. Varion Associates*, 811 F.2d 279 (9th Cir. 1987), which held that a private right of action must exist in the federal statute to raise federal question jurisdiction. While congress did not give states or state officials a cause of action in federal court, it did give citizens in certain instances a cause of action. *See* 15 U.S.C. § 1640 which is attached hereto as App. L, p. 124a. This conclusively satisfies *Utley* and *Thompson*. In addition, as the Iowa federal court has previously noted, this is also sufficient to grant pendent jurisdiction to the federal court. *See Schwab v. Erie Lackwana R.R.*, 303 Fed. S. 1398 (D.C. Pa. 1964). The federal court should have exercised jurisdiction over this matter.

In one instance Judge O'Brien noted that private civil relief under 15 U.S.C. § 1667(c) was specifically precluded due to the legislative history to that effect. Yet, at the same time, the court recognized a "colorable" question of federal preemption. (App. C, p. 27a, n. 4) In that regard the court

referred to *Metropolitan Life Ins. v. Taylor*, 107 S. Ct. 1542 (1987) which provides:

> [t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that congress rejected in ERISA.
>
> *Id.* at 1547.

While the Iowa Federal court held that "under the logic of *Thompson*, 106 S.Ct. at 3229, Congress' refusal to create a private cause of action to assert [Part C and Regulation Z] violations prevents the court from exercising federal subject matter jurisdiction over *those* actions", preemption mandates federal jurisdiction. Even if this were true, the Court should have exercised jurisdiction over the three other cases. Unlike the federal act involved in *Franchise Tax Board*, 29 U.S.C. § 1144(b) (2) (A), the TILA provides no exception from federal preemption.

The only case recognized by the Federal court which specifically addressed TILA violations and remedies was *Jordan v. Montgomery Ward & Co.*, 442 F.2d 78 (8th Cir. 1971) In *Jordan*, a distinction was made only as to sections of the TILA where a private cause of action existed and sections where it did not. In fact, the court in *Jordan* noted where a private cause of action did not exist, Congress *intended* administrative enforcement:

> The language of section 108 (15 U.S.C. Sec. 1607) and the legislative history evidences that Congress intended that the Act be enforced primarily by administrative agencies. However, provision is made for the institution of a civil action by an aggrieved debtor under specific circumstances. (Citations omitted)
>
> > "[T]he bill specifically exempts credit advertising from the application of civil penalties. This exemption has been written into the bill by your committee to avoid the possibility that anyone, not a party to an actual transaction, seeing an advertisement not complying with the disclosure requirements of

> the bill would attempt to seek civil penalties." U.S. Code Cong. & Admin. News, p. 1976.

Jordan, 442 F.2d at 81.

The sole conclusion to be drawn from the *Jordan* analysis was that original subject matter jurisdiction over the credit advertising provisions of TILA may not be conferred upon private citizens or private attorneys general, but only upon federal administrative agencies. *Jordan*, 442 F.2d at 81.

The above conclusion merely begs the questions for which *Taylor* provides the answer. Since TILA provides administrative enforcement in some instances and private remedies in others, preemption exists. *Metropolitan Life Ins. v. Taylor*, 107 S. Ct. 1542, 1547 (1987); *see also Pilot Life Ins. v. Dedeaux*, 107 S. Ct. 1556 (1987). The Iowa Federal court recognized the existence of a preemption issue but added the issue need not be addressed in order to resolve the jurisdictional issue. This runs counter to *Williams* and *Taylor* which require an inquiry into preemption first. Unlike the state tax collection suit in *Franchise Tax Board*, no allowance for state law enforcement or remedies is made by congress under TILA.

Only after an analysis of whether preemption had occurred with regard to the TILA provisions cited in respondent's petition should the federal court have addressed whether state law or federal law applied, and then whether federal question jurisdiction necessarily existed. Indeed, due to the preemption issue present here, the answer to the question of the relief provided, both privately and administratively under TILA, necessarily implies federal jurisdiction.

The preemption doctrine simply destroys the *Thompson* analysis. This is especially so with regard to the alleged "leasing violations" under Part E and Regulation M which are actionable under 15 U.S.C. § 1640. The leasing advertising allegations, although to use the Iowa federal court's terms "relatively minor" (App. C, p. 9), become yet another basis for that court to exercise federal subject matter jurisdiction. Indeed, to adopt the "Thompson approach" of proceeding "with an eye to practicality and necessity...and with the nature of the federal interest at stake in mind", 106 S.Ct. 3234 and

3236 n.12, required that the federal court exercise jurisdiction and avoid state circumvention of Congressional intent. The Court must declare this a federal matter to be heard by a federal court in order to protect that intent.

Alternatively, the federal court sought to address the approach of *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988). This "alternative approach" theory requires a finding *either* that federal law creates the cause of action or that plaintiff's right to relief necessarily depends upon the resolution of a substantial question of federal law. *Id.* at 4627. While noting the "slippery" distinction between claims and theories, the federal court concluded plaintiff's claim did not depend solely upon federal law. (App. C, p. 11)

The "claim" the court recognized was a violation of the Iowa Consumer Fraud Act, Iowa Code § 714.16(2)(a) (1987) (as amended). This the court held was plaintiff's claim despite the fact that the *elements* of the claim consisted entirely of provisions and alleged violations of the TILA. The court held the citations of the provisions of the TILA and of § 714.16(2)(a) provide "alternative theories" for a solely state created cause of action. Petitioners submit the TILA and 714.16(2) cannot be alternate theories since a determination of alleged TILA violations is a prerequisite to proof of a violation under either. If this were not the case, Respondent simply could have dropped its list of alleged TILA violations and relied exclusively upon § 714.16(2)(a).

Nevertheless, even if the Court considers the citation of alleged federal and state violations as presenting alternative theories, this in and of itself does not preclude federal subject matter jurisdiction. *Chandler v. Riverview Leasing Inc.*, 602 F. Supp 157 (D.C. Pa. 1984).

Indeed, *Chandler* also recognized the common approach would be for a court first to allow removal (because subject matter jurisdiction necessarily exists) and only then decide whether to exercise jurisdiction over the pendent "state" claims. *Id.*

The error in the federal court's analysis was that it found merely because state law provided a state remedy for federal

TILA violations, federal law was only one theory, not necessary to the success of plaintiff's overall claim. As noted previously, even if the relief available is found solely under state law that has nothing to do with whether federal jurisdiction attaches. *See Avco Corp. v. Machinists*, 390 U.S. 557. In fact the Supreme Court noted in *Avco* that petitioner's action could be removed to federal court *even* though he had "undoubtedly" pleaded an adequate claim for relief under the state law and had sought a remedy available only under state law. *Id.*

The preemption issue must be kept in mind. *Christianson* presumes no preemption problem exists. *Christianson* involved alternative theories only one of which involved federal patent law interpretation by a federal court. Under the directives of *Metropolitan Life Ins. v. Taylor*, 107 S. Ct. 1542 (1987), notwithstanding the fact that state law may provide a cause of action, if a federal law preempts the area, the ordinary state complaint is converted into one stating a federal claim for purposes of the well pleaded complaint rule. *Id.* at 1547.

The Court must therefore address preemption under the alternative approach of *Christianson*. Under either alternative theory the answer is the same. Federal law allows the sole cause of action and accordingly its interpretation will determine whether respondent is entitled to relief.

CONCLUSION

The decision of the Supreme Court of Iowa that the Iowa courts may exercise personal jurisdiction over the Nebraska Dealers was in violation of the Dealers' constitutional right to due process as well as the constitutional standards of this Court. The requisite minimum contacts for a proper exercise of personal jurisdiction are not present in this case. The incidental circulation of the Nebraska newspaper into Iowa constitutes less than 2% of the total circulation of the newspaper and is the result of the paper's circulation policy, not any act of the Dealers.

The minimum contacts test was set forth by this Court to insure protection for important constitutional rights. However, many state and federal courts have decided the issue of personal jurisdiction in a manner inconsistent with the standards of the United States Supreme Court. Further clarification is therefore necessary to eliminate this conflict among the various courts as well as to prevent any further infringement of constitutional rights through the improper assertion of personal jurisdiction.

If the Iowa Supreme Court decision is allowed to stand, it will have a serious impact upon interstate commerce and the First Amendment rights of Nebraskans. It would give the Attorney General of the State of Iowa unprecedented power to regulate activities of other states by enforcing Iowa law beyond the borders of Iowa. Such regulation would be an impermissible burden upon interstate commerce, in addition to the chilling effect upon the First Amendment rights through the regulation by Iowa of a Nebraska newspaper. Where, as here, the laws of two states conflict, the law of the state with the greater interest in the subject matter should be applied. It is clear that Nebraska interests are superior in this case.

Not only do the state courts of Iowa lack personal jurisdiction in this matter, they also lack subject matter jurisdiction. This case should have remained in federal court and been dismissed. The State of Iowa's entire complaint is based solely upon federal law. Both the language and the legislative history of the Federal Truth-In-Lending Act indicate that enforcement and remedies are a federal concern. Civil remedies are afforded private citizens only in certain instances, and other matters are left to federal administrative enforcement.

The federal court should have considered the preemption issue before it remanded the case to state court. If there is preemption, federal question jurisdiction exists regardless of whether a proper state action is pled and relief exists under state law.

The Iowa courts do not have personal or subject matter jurisdiction in this action. This improper assertion of jurisdiction will have serious implications as it is in violation of the

Dealers' constitutional rights to due process. These implications also extend far beyond the individual Dealers, but concern the constitutional rights of all Nebraskans, and perhaps all U.S. citizens.

Wherefore, in view of the fact that the decision of the Iowa Supreme Court deprived Petitioners of Constitutional guarantees of the First and Fourteenth Amendments and violated interstate commerce and the Full Faith and Credit Clause, the Petitioners respectfully request this Court issue a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF IOWA

No. 83/89-680

(Filed May 23, 1990)

STATE OF IOWA ex rel. THOMAS J. MILLER, Attorney General of Iowa,

Appellant,

vs.

BAXTER CHRYSLER PLYMOUTH, INC.,

and

TALTON K. ANDERSON, In His Corporate Capacity as President of Baxter Chrysler Plymouth, Inc.,

---

JOHN MARKEL, INC.,

and

TIMOTHY S. MARKEL, In His Corporate Capacity as President of John Markel, Inc.

DEAN RAWSON NISSAN, INC.,

and

DEAN C. RAWSON, In His Corporate Capacity as President of Dean Rawson Nissan, Inc.,

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JOHN KRAFT CHEVROLET, INC. d/b/a/ John Kraft Chevrolet-Isuzu, Inc.,

and

JOHN E. KRAFT, In His Corporate Capacity as President of John Kraft Chevrolet, Inc.,

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STAN OLSEN PONTIAC, INC. d/b/a Olsen Auto World and Olsen Family Discount Center,

METROPOLITAN LINCOLN-MERCURY, INC. d/b/a Olsen Auto World, Olsen Family Discount Center, and Metro Motors,

OLSEN DODGE, INC. d/b/a Olsen Family Discount Center and Olsen Auto World,

STANLEY OLSEN, In His Corporate Capacity as President of Metropolitan Lincoln-Mercury, Inc., and Stan Olsen Pontiac, Inc., and

RONALD OLSEN, In His Corporate Capacity as President of Olsen Dodge, Inc.,

Appellees.

Appeal from the Iowa District Court for Pottawattamie County, Glen M. McGee, Judge.

The State, *ex relatione* the attorney general, appeals the dismissal for want of in personam jurisdiction of unlawful advertising claims brought against Nebraska automobile dealers. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Thomas J. Miller, Attorney General, Richard L. Cleland, Special Assistant Attorney General, and William L. Brauch, Assistant Attorney General, for appellant.

Gregory G. Barntsen of Smith, Peterson, Beckman & Willson, Council Bluffs, for appellee Dean Rawson Nissan, Inc., and Dean C. Rawson.

James D. Sherrets and Mark A. Weber of Sherrets & Smith, Omaha, Nebraska, and Sheldon Gallner of Gallner & Gallner, Council Bluffs, for all other appellees.

Considered by Harris, P.J., and Schultz, Carter, Snell, and Andreasen, JJ.

CARTER, J.

The State, *ex relatione* the attorney general (the attorney general), appeals from the dismissal of want of in personam jurisdiction of unlawful advertising claims brought against five Nebraska automobile dealers pursuant to the Iowa Consumer Fraud Act, Iowa Code § 714.16 (1987). The ten defendants are automobile dealerships and their respective corporate presidents whose businesses are located in Omaha, Nebraska.

These five separate actions were filed on September 4, 1987, in the Iowa District Court for Pottawattamie County. The attorney general alleges that the defendants caused advertisements to be circulated in this state which were deceptive and misleading and in violation of the Iowa Consumer Fraud Act, Iowa Code § 714.16 (1987), and the Iowa Consumer Credit Code, §§ 537.6104(2), 537.6110, 537.6112, and 537.6113 (1987). The actions seek to enjoin defendants from advertising, offering for sale or lease, attempting to sell or lease, or selling or leasing motor vehicles in violation of these statutes. The actions also seek to enjoin defendants from employing deceptive or unfair advertising practices and seek restitution for Iowa citizens of any monies wrongfully acquired by means of the allegedly unlawful advertising practices.

The defendants in each of the actions filed motions to dismiss, urging that the Iowa courts lacked in personam jurisdiction over them. The district court found that all of the defendants lacked sufficient contacts with the State of

Iowa for purposes of establishing in personam jurisdiction of an Iowa court to hear these claims. The court granted the motions to dismiss the actions. After considering the arguments of the parties on the jurisdictional issue, we affirm the district court's decision concerning the individual defendants but reverse its decision concerning the corporate defendants. As to the corporate defendants, we hold that in personam jurisdiction has been established with respect to the claims asserted.

The unlawful advertising claims against defendants are based on advertising in the *Omaha World Herald* by all five dealerships and television advertising over an Omaha television station by the defendant Baxter Chrysler Plymouth. In addition to these advertisements, all five dealerships have placed telephone listings in the U.S. West Yellow Page Directory for Council Bluffs, Iowa. Defendants Baxter Chrysler-Plymouth and Olsen Auto World accompanied their yellow page listings with large block advertisements in the Council Bluffs yellow pages.

The *World Herald* is a daily Nebraska newspaper serving the Omaha metropolitan area, including the City of Council Bluffs, Iowa, which is located directly across the Missouri River from Omaha.[1] The *World Herald* publishes several editions including a metropolitan edition,

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[1] Council Bluffs and Omaha comprise a Standard Metropolitan Statistical Area (SMSA), which is defined by the U.S. Census Bureau as "a large population nucleus, together with adjacent communities which have a high degree of economic and social integration with that nucleus." U.S. Department of Commerce, Bureau of the Census, *1980 Census of Population, General Population, Iowa* 17-5, A-4 (Aug. 1982).

which is distributed in the Omaha-Council Bluffs area, and an Iowa edition, which contains features specifically geared toward Iowans and is distributed to persons living in Iowa but outside the Omaha-Council Bluffs area. The advertisements which defendants placed in the *World Herald* were included in the metropolitan and Iowa editions which reach Iowa residents. Advertising policies at the *World Herald* are such that an advertiser cannot restrict its advertisements to just those versions of the *World Herald* distributed in Nebraska.

Although the parties are not in total agreement concerning the *World Herald*'s circulation statistics, our own review of the affidavits filed in support of and in response to the motion to dismiss suggests that at the times material to the attorney general's claims this newspaper had 221,091 daily subscriptions and 286,990 Sunday subscriptions. Of the daily subscriptions, 3700 were home delivered to residents of Council Bluffs, Iowa. Of the Sunday subscriptions, 5700 were home delivered to residents of Council Bluffs, Iowa, and over 27,000 were home delivered to subscribers residing in other Iowa locations. Daily subscriptions home delivered in Council Bluffs represented 1.8% of the paper's total subscriptions. Sunday subscriptions home delivered in Council Bluffs represented 2.0% of total subscriptions. Total Iowa home-delivered Sunday subscriptions represented approximately 11.5% of total Sunday subscriptions.

In seeking reversal of the district court's order, the attorney general argues that, by means of the broad language of Iowa Rule of Civil Procedure 56.2, the jurisdictional reach of the courts of this state has been expanded

to the widest parameters permitted under the due process clause of the federal constitution.[2] Recognizing that a state may only exercise jurisdiction over a nonresident defendant if that person has maintained "certain minimum contacts" with a forum state, the attorney general urges that defendants' contacts with this state have been substantial and are sufficient to satisfy the due process limitations on in personam jurisdiction.

The attorney general's argument emphasizes the fact that the defendants advertise on an almost daily basis in both the metropolitan edition (circulated in the Council Bluffs area) and the Iowa edition of the *World Herald*. This argument contends that advertising in a publication with the knowledge that it is regularly disseminated to subscribers in a particular state is an affirmative act to advertise in that state. From this premise, it is urged that, every time a copy of the *World Herald* which contains an advertisement by one of the defendants is sold to an Iowan in Iowa, that event constitutes a separate contact by that defendant with the State of Iowa. Considering only the Sunday edition of the *World Herald*, this adds up to 1,722,448 contacts per year. The attorney general urges that based on these figures defendants' contacts with the State of Iowa are substantial.

The defendants seek to uphold the district court's ruling on the ground that the mere likelihood that the advertisements placed in the Omaha newspaper will find their way into Iowa is insufficient to provide the requisite

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[2] Each of the defendants was served personally in the State of Nebraska pursuant to Iowa Rule of Civil Procedure 56.2.

minimum contacts for in personam jurisdiction. They have not, defendants urge, purposefully availed themselves of the privilege of conducting activities within the State of Iowa thereby invoking the benefits and protections of its laws. Defendants assert that the *World Herald* is a third party whose Iowa activities are not attributable to its Nebraska advertisers for purposes of the attorney general's minimum-contact theory.

I. Scope of Review.

The standard of review for this type of case was discussed most recently in *Smalley v. Dewberry*, 379 N.W.2d 922 (Iowa 1986). The allegations made in the State's petitions and the affidavits submitted to the trial court, if uncontradicted, must be accepted as true. The plaintiff has the burden of establishing jurisdiction, but after a prima facie case has been established, the burden passes to the defendant to produce evidence to rebut or overcome the prima facie showing. The trial court's findings have the force and effect of a jury verdict, however, the court is not bound by the trial court's application of legal principles or conclusions of law. *Smalley*, 379 N.W.2d at 924 (quoting *Svendson v. Questor Corp.*, 304 N.W.2d 428, 429 (Iowa 1981)); *see also Berkeley Int'l Co. v. Devine*, 289 N.W.2d 600, 602 (Iowa 1980).

II. Jurisdiction Over Corporate Defendants.

A state may exercise jurisdiction over nonresident defendants under the due process clause of the fourteenth amendment only if the defendant has certain

"minimum contacts" with the forum state. *See International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945). The defendants must have sufficient contacts such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Id.* at 316, 66 S. Ct. at 158, 90 L. Ed. at 102.

In *Smalley*, this court indicated that under *International Shoe* and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980), the jurisdictional inquiry centers on five factors:

1. the quantity of the contacts;
2. the nature and quality of those contacts;
3. the source and connection of the cause of action with those contacts;
4. the interest of the forum state; and
5. the convenience of the parties.

Smalley, 379 N.W.2d at 924, *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). The first three factors of this test are the most important, *Smalley*, 379 N.W.2d at 924; however, this court has held that the test "is not susceptible of mechanical application; rather, the facts of each case must be weighed to determined whether the requisite 'affiliating circumstances' are present." *Id.* (quoting *Kulko v. California Superior Court*, 436 U.S. 84, 92, 98 S. Ct. 1690, 1697, 56 L. Ed. 2d 132, 141 (1978)).

The attorney general argues that defendants' conduct and connections with the State of Iowa are such that they can reasonably anticipate being haled into court here.

This argument is tailored to *World-Wide Volkswagen Corp.*, where the Court stated:

> [I]f the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve *directly or indirectly*, the market for its products in other States, it is not unreasonable to subject it to suit in one of those States . . . .

Id. at 297-98, 100 S. Ct. at 567, 62 L. Ed. 2d 490 (emphasis added). The attorney general argues that defendants' numerous advertisements in Iowa, and the fact that their businesses are located in a market area which contains parts of Iowa, show that they have made efforts to directly serve the Iowa market. Therefore, it is reasonable, he asserts, to subject them to the jurisdiction of Iowa courts and they can reasonably anticipate being haled into court in Iowa.

The attorney general also relies heavily on *Svendsen v. Questor Corp.*, 304 N.W.2d 428 (Iowa 1981), a case involving a Missouri pool table manufacturer sued by an Iowa resident injured in Iowa when her pool table, purchased from an Omaha retailer, collapsed. This court found that the foreign defendant was subject to the personal jurisdiction of the court, and stated that the question before the court was whether the nonresident manufacturer, who indirectly through others served or sought to serve the Iowa market, was subject to the jurisdiction of Iowa courts.

Relying on *World-Wide Volkswagen*'s language regarding the efforts of a manufacturer to directly or indirectly

serve a market, we concluded in *Svendsen* that the allegations in plaintiff's petition satisfactorily demonstrated that the Missouri defendant, through its action in marketing its product via the Omaha retailer, sought to serve the Iowa market and was, therefore, subject to the jurisdiction of Iowa courts. 304 N.W.2d at 431.

This holding was reached even though the record in the case did not disclose the marketing territory of the foreign defendant. We stated that it was reasonable to infer that the defendant's commercial transactions resulted in more than insubstantial use and consumption in Iowa. *Id.* We relied in part in our *Svendsen* holding on the close proximity of the defendant's location in Missouri to the State of Iowa and on the fact that the pool table had been sold to the Iowa consumer in Omaha, Nebraska, in finding that it was "foreseeable" to the defendant that it would be haled into an Iowa court. *Id.*

The attorney general argues that the analysis in *Svendsen* dictates a similar result in the present case because the defendants here sought to serve the Iowa market through its newspaper advertisements, television advertisements, and yellow pages listings and advertisements. Moreover, he argues that, because defendants conduct their businesses in a major metropolitan area that encompasses cities in two states, and because they advertise in media that directly serves the area in both states, it is reasonable to infer that their commercial transactions result in more than insubstantial use and consumption in Iowa. The attorney general notes that, although the defendants are not manufacturers, they can foresee that the motor vehicles which they sell will be purchased by Iowans and used within this state.

The defendants argue that the State's reliance on *Svendsen* and its foreseeability analysis is inappropriate because it was decided prior to the *Smalley* decision. Defendants contend that in *Smalley* this court substantially modified the "stream of commerce theory" applied in *Edmundson v. Miley Trailer Co.*, 211 N.W.2d 269 (Iowa 1973). 379 N.W.2d at 924-25. They urge that *Svendsen*, like *Edmundson*, involved the question of foreseeability as to whether a Missouri manufacturer could have "reasonably anticipated" being haled in Iowa court. Because *World-Wide Volkswagen* and our *Smalley* holding have retreated from that doctrine, defendants contend that *Svendsen* is no longer appropriate authority.

We conclude that our *Smalley* holding in fact reaffirmed the *Svendsen* holding, stating "the manufacturer in *Svendsen* was indirectly, through others, seeking to secure a market in Iowa." 379 N.W.2d at 925. We find both *Svendsen* and *Smalley* to be consistent with the reasoning in *World-Wide Volkswagen*. In *Smalley* and *Edmundson*, "foreseeability" concerned the foreseeability to defendants that their products would eventually cause harm in foreign states, hundreds of miles from their market area. The defendants in these cases did not advertise in the forum state. In the present case, the claim is that the advertisements themselves are the unlawful act giving rise to the cause of action. Consequently, the "foreseeability" issue is foreseeability that the advertisements would be distributed in the Iowa market area. That such distribution would occur was a virtual certainty.

The attorney general argues that in deciding issues of in personam jurisdiction fewer contacts by a defendant with the forum state are required where the cause of

action arises from the defendant's activities within that state. This argument finds considerable support in the *International Shoe* case, where the court recognized that certain single or occasional acts in a state will suffice "because of their nature and quality and the circumstances of their commission," to subject the defendant to the jurisdiction of the state as to causes of action arising out of the act. *International Shoe*, 326 U.S. at 318-20, 66 S. Ct. at 159-60, 90 L. Ed. at 103-05. This principle was reaffirmed in *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223, 78 S. Ct. 199, 201, 2 L. Ed. 2d 223, 226 (1957).

More recently, in *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S. Ct. 1868, 1872, 80 L. Ed. 2d 404, 411 nn.8, 9 (1984), the Supreme Court drew a distinction between "general" and "specific" jurisdiction based on the nature of the contacts with the forum state. This view was sharpened in *Burger King* where the court observed "[w]here a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Id.* at 472, 105 S. Ct. at 2182, 85 L. Ed. 2d at 540-41 (citations omitted) (footnote omitted). To this observation, the Court added "[a] State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors. . . . [I]t may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities . . . . " *Id.* at 473-75, 105 S. Ct. at 2182-83, 85 L. Ed. 2d at 541-42

(citations omitted). We find the principles espoused in *Burger King* to be equally applicable to efforts by the state itself to enjoin activities within the forum which contravene its laws.

We believe that the contacts which exist between the corporate defendants and the State of Iowa are clearly insufficient to subject them to suit in the Iowa courts on any cause of action to the same extent as Iowa domiciliaries. Their acts in advertising within this state are sufficient, however, to render them amenable to suit here in an action which seeks to halt that advertising on the ground that it is unlawful. The acts of advertising also establish in personam jurisdiction over these defendants for that portion of the attorney general's action which seeks to invoke the other sanctions which are provided in the relevant regulatory statutes for injuries which flow directly from the alleged unlawful advertising.

Basing in personam jurisdiction on the allegedly unlawful advertising carried on in the forum state does not differ significantly in a constitutional sense from the single act tort jurisdiction which has been recognized in this state since the enactment of Iowa Code section 617.3 in 1963. *See* 1963 Iowa Acts ch. 325, § 1. This jurisdictional nexus not only finds support in *International Shoe, McGee,* and *Burger King,* but also in those decisions recognizing extended in personam jurisdiction in actions directed at activities which a state subjects to special regulation. *See, e.g., Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n,* 339 U.S. 643, 648-50, 70 S. Ct. 927, 930-31, 94 L. Ed. 1154, 1161-62 (1950) (upholding jurisdiction of Virginia court to issue cease and desist order against Nebraska company doing mail order insuring business in

Virginia); *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623, 627-28, 55 S. Ct. 553, 554, 79 L. Ed. 1097, 1099 (1935) (suit in Iowa to vindicate Iowa's interest in regulating sale of securities by New York resident).

III. Jurisdiction Over Individual Defendants.

The individual defendants, who are officers of the corporate automobile dealerships, urge that, irrespective of whether any basis exists for an Iowa court to exercise in personam jurisdiction over the corporate defendants, they are not subject to suit here under our holding in *ex rel. Miller v. Internal Energy Management Corp.*, 324 N.W.2d 707 (Iowa 1982). In that case, we concluded that the fiduciary shield doctrine is applicable with respect to determinations involving in personam jurisdiction over corporate officers as well as to the merits of the claims against those officers in their individual capacity.

We held in *Internal Energy Management* that under the fiduciary shield doctrine a nonresident corporate agent is not individually subject to the forum state's in personam jurisdiction if that individual's only contact with the forum is by virtue of his acts as a fiduciary of the corporation. *Id.* at 710-12. Our review of the papers submitted in support of and in resistance to the motion to dismiss convinces us that the district court's ruling was correct with respect to the individual defendants. The attorney general has failed to demonstrate how any of these persons performed acts in this jurisdiction other than the acts of the corporation with which they were associated.

IV. Subject Matter Jurisdiction.

The defendants also urge that the district court was without subject matter jurisdiction over this controversy. We find no merit in that contention. For purposes of this argument, we must treat subject matter jurisdiction as involving the power of the court to hear and decide cases of the general class to which the proceeding belongs. The Iowa District Court being a court of general jurisdiction is clearly empowered to hear cases brought by the attorney general to vindicate alleged violation of the regulatory statutes which give rise to the claims in the present case.

We note in this regard, however, that subject matter jurisdiction should not be confused with legislative jurisdiction, *i.e.*, whether a state may constitutionally apply the law of the forum in adjudicating the validity of transactions which took place in whole or in part in another jurisdiction, *see* Restatement (Second) of Conflict of Laws § 6, 9 (1971), or whether a state's choice of law rules permit application of its laws to a transaction which occurred in whole or in part outside of its borders. These are matters which go to the merits of the attorney general's claims and do not bear on in personam or subject matter jurisdiction of the court.[3]

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[3] In *Burger King*, the court observed:

> [W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. Most such considerations usually may be accommodated through means short

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We have considered all arguments presented and conclude that the judgment of the district court should be affirmed with respect to its dismissal of the claims against the individual defendants. The district court's judgment is reversed with respect to those claims against the corporate defendants which seek to enjoin the allegedly unlawful advertising carried on in this state by those defendants and those additional claims based on injuries which flow directly from the alleged unlawful advertising. Costs of appeal are taxed one-half to the appellant and one-half to the appellees.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

(Continued from previous page)

> of finding [in personam] jurisdiction unconstitutional. For example, the potential clash of the forum's law with the "fundamental substantive social policies" of another State may be accommodated through application of the forum's choice-of-law rules.

471 U.S. at 477, 105 S. Ct. at 2184-85, 85 L. Ed. 2d at 543-44 (footnote omitted).

APPENDIX B

IN THE SUPREME COURT OF IOWA

No. 89-680

ORDER

(Filed June 20, 1990)

STATE OF IOWA ex rel. THOMAS J. MILLER, Attorney General of Iowa,

Appellant,

vs.

BAXTER CHRYSLER PLYMOUTH, INC.

and

TALTON K. ANDERSON, In His Corporate Capacity as President of Baxter Chrysler Plymouth, Inc.

JOHN MARKEL, INC.,

and

TIMOTHY S. MARKEL, In His Corporate Capacity as President of John Markel, Inc.,

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DEAN RAWSON NISSAN, INC.,

and

DEAN C. RAWSON, In His Corporate Capacity as President of Dean Rawson Nissan, Inc.,

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JOHN KRAFT CHEVROLET, INC. d/b/a John Kraft Chevrolet-Isuzu, Inc.,

and

JOHN E. KRAFT, In His Corporate Capacity as President of John Kraft Chevrolet, Inc.,

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STAN OLSEN PONTIAC, INC. d/b/a/ Olsen Auto World and Olsen Family Discount Center,

METROPOLITAN LINCOLN-MERCURY, INC. d/b/a Olsen Auto World, Olsen Family Discount Center, and Metro Motors,

OLSEN DODGE, INC. d/b/a Olsen Family Discount Center and Olsen Auto World,

STANLEY OLSEN, In His Corporate Capacity as President of Metropolitan Lincoln-Mercury, Inc., and Stan Olsen Pontiac, Inc., and

RONALD OLSEN, In His Corporate Capacity as President of Olsen Dodge, Inc.,

Appellees.

After consideration by the court, en banc, appellees' Petition for Rehearing in the above-captioned matter is hereby overruled and denied.

Done this 20th day of June, 1990.

THE SUPREME COURT OF IOWA

/s/ Arthur A. McGiverin
Arthur A. McGiverin
Chief Justice

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
WESTERN DIVISION

(Filed Jul 13, 1988)

STATE OF IOWA ex rel. THOMAS J. MILLER, Attorney General of Iowa, Plaintiff, vs. STAN OLSEN PONTIAC, INC., d/b/a Olsen Auto World and Olsen Family Discount Center, et al., Defendants.	CIVIL NO. 87-93-W
and BAXTER CHRYSLER PLYMOUTH, INC., et al., Defendants.	CIVIL NO. 87-94-2-W
and JOHN MARKEL, INC., d/b/a Markel Ford, et al., Defendants.	CIVIL NO. 87-95-W

and	)	
JOHN KRAFT CHEVROLET, INC., d/b/a/ John Kraft Chevrolet- Isuzu, Inc., et al.,	)	CIVIL NO. 87-96-W
Defendants.	)	
and	)	
DEAN RAWSON NISSAN, INC., et al.,	)	CIVIL NO. 87-102-W
Defendants.	)	

These cases were removed by the defendants from state court and are now before this court on a motion to remand for lack of subject matter jurisdiction filed by the plaintiff and motions to dismiss for lack of personal jurisdiction filed on behalf of the defendants. These cases have consolidated in order to resolve these motions in a single proceeding. For the following reasons, the court grants the motion to remand and finds that it lacks subject matter jurisdiction to address the defendants' motions to dismiss.

Thomas Miller, the Attorney General of the state of Iowa, filed five separate actions against Nebraska car dealers in Iowa District Court for Pottawattamie County, Iowa, alleging that the dealers' advertisements violated "both the federal Truth-in-Lending Act and the applicable Iowa statutes." These ads were placed in the Omaha World-Herald, which is widely circulated on the Iowa side of the Missouri River, and on Omaha television

stations. In each case the Attorney General seeks a temporary and permanent injunction against the violations alleged.

The structure of each of the complaints filed in state court is similar, although the substance differs in certain respects. Because the complaints were filed in state court, the plaintiff made no attempt to plead a federal basis for jurisdiction. The jurisdictional paragraph of the complaints states that "[T]he Iowa district court has jurisdiction of this action pursuant to Iowa Code §§ 537.1201(1)(c), 537.1203, 537.6104(2) and 714.167, (as amended)". Iowa Code § 537 is the Iowa Consumer Credit Code, a derivation of the Uniform Consumer Credit Code, and section 714 is the Iowa Consumer Fraud Act. Various provisions of each Iowa statute provide the Attorney General with remedies to enforce each act. *See* §§ 537.6110, 537.6112, 537.6113, and 714.16.

The federal aspect of the plaintiff's complaint which the car dealers relied upon in removing these cases to federal court lies in the list of prohibitions which the defendants allegedly violated. Each complaint alleges that the defendants' advertisements violated portions of Part C of the federal Truth-in-Lending Act, 15 U.S.C. §§ 1601-1693, and of portions of Regulation Z, 12 C.F.R. § 226 (1987), which the Federal Reserve Board of Governors promulgated as a binding interpretation of certain provisions of the Truth-in-Lending Act (TILA). In three of the five cases, the complaints also allege specific violations of Part E of the amended version of the TILA, and of Regulation M, 12 C.F.R. § 213 (1987). The Attorney General claims that Iowa Code § 537.6104(2) authorizes him to enforce the federal TILA in state court in his

capacity as administrator of the Iowa Consumer Credit Code.[1] Every action described as a violation of a federal standard is also alleged to constitute a violation of section 714.16(2)(a) of the Iowa Consumer Fraud Act[2] and section 537.3209 of the Iowa Consumer Credit Code.[3]

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[1] Iowa Code § 537.6104(2) states that "the administrator may enforce the Truth-in-Lending Act to the fullest extent provided by law." Under section 537.6103, the Attorney General is the administrator. The court need not decide whether these state law provisions give rise to an implied cause of action to enforce the TILA, or simply confer authority upon the Attorney General to use any causes of action otherwise available under the TILA.

[2] Iowa Code § 714.16(2)(a) states in relevant part:

> The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertising of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.

[3] Iowa Code § 537.3209 states:

> 1. A seller, lessor, or lender shall not advertise, print, display, publish, distribute, utter or broadcast, or cause to be advertised, printed, displayed, published, distributed, uttered or broadcast in any manner, any false, misleading, or deceptive statement or representation with regard to the rates, terms or conditions of credit with respect to a consumer credit transaction.

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I. SUBJECT MATTER JURISDICTION

The defendants' removal petition asserted that this court has diversity jurisdiction because the plaintiff is a citizen of Iowa while the defendants are citizens of Nebraska. Attorney General Miller is proceeding in his official capacity, and for this reason this action must be treated as a suit by the State of Iowa. *Nuclear Engineering Co. v. Scott*, 660 F. 2d 241, 250-1 (7th Cir. 1981). It is well established that a state may not be considered as a "citizen" for purposes of determining diversity jurisdiction. *Moor v. County of Alameda*, 411 U. S. 693, 717 (1973); *Postal Telegraph Cable Co. v. State of Alabama*, 155 U. S. 482, 487 (1894). It follows that all of the parties who are citizens are citizens of Nebraska, so diversity does not exist.

The defendants' strongest argument is that federal question jurisdiction exists because the face of each of the plaintiff's complaints alleges violations of federal law. "The presence or absence of federal-question jurisdiction is governed by the 'well pleaded complaint rule,' which

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2. Advertising that complies with the Truth-in-Lending Act does not violate this section.

3. This section does not apply to the owner or personnel, as such, of any medium in which an advertisement appears or through which it is disseminated.

However, because paragraph 2 appears to create a defense for a defendant to assert rather than an additional element which the plaintiff must establish, it is not significant for jurisdictional puposes. *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California*, 463 U. S. 1, 12 (1983).

provides that federal jurisdiction exists only where a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar v. Williams*, 107 S. Ct. 2435, 2429 (1987).

Behind this seemingly simple rule lies a convoluted body of judicial interpretations. Unfortunately, these decisions defy any attempt to create a single "test" for federal question jurisdiction. At present the Supreme Court is using two different approaches – the "Holmes approach" set out in Justice Stevens' opinion for the majority in *Merrill Dow Pharmaceuticals, Inc. v. Thompson*, 478 U. S. 804, 106 S. Ct. 3229 (1986), and the broader approach described by Justice Brennan in his opinions for the majority in *Christianson v. Colt Industries Operating Corp.*, 65 U.S.L.W. 4625 (U.S. June 17, 1988), and *Franchise Tax Board*.

This court has little choice but to apply each approach and hope that the results do not differ. Luckily, they do not; under each approach the court must find that it lacks federal question jurisdiction. Accordingly, this case was improvidently removed to federal court and must be remanded.

A.

In *Merrill Dow Pharmaceuticals, Inc. v. Thompson*, the Supreme Court considered whether federal question jurisdiction existed in a case in which a tort plaintiff alleged that a drug manufacturer was negligent per se under state law because it misbranded its product in violation of the federal Food, Drug and Cosmetic Act.

Federal law provided an essential element of the plaintiff's claim, but only state law provided the plaintiff with a cause of action to seek relief on the basis of that violation. The Supreme Court focused upon the failure of Congress to provide a private cause of action and the court's unwillingness to infer a private cause of action from the federal act in question:

> We simply conclude that the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently "substantial" to confer federal-question jurisdiction.

106 S. Ct. 3236.

In enacting the federal TILA, Congress has created an express cause of action which *certain* private citizens can use to seek relief in federal court for violations of *certain* portions of the TILA. *See* 15 U.S.C. § 1640. Defendants rely upon this in seeking to distinguish this case from *Thompson*, but their argument does not withstand close scrutiny. Congress did not give states or state officials a cause of action to seek relief in federal court for violations of the TILA suffered by their citizens. At least one court has phrased the *Thompson* test in a way which would make this a critical distinction. *See Utley v. Varian Associates, Inc.*, 811 F. 2d 1279, 1284 (9th Cir. 1987) ("Only if the executive order provides Utley with a private right of action against Varian in federal court might his complaint raise a 'substantial, federal question permitting removal jurisdiction.").

Furthermore, Congress did not provide *any* private citizen with a cause of action to seek relief against advertisements which violate two of the three TILA provisions relied upon by the plaintiff. The plaintiff's complaints cite three sections of the TILA – §§ 1662, 1664 and 1667(c). Sections 1662 and 1664 – concerning credit advertising – were contained in Part C (previously called Chapter 3) of the TILA; section 1667(c) – concerning leasing advertising – was later added when Part E was enacted in 1976. As the Eighth Circuit recognized in *Jordan v. Montcomery Ward & Co.*, 442 F. 2d 78 (8th Cir. 1971), "it was the intent of the Congress not to provide private civil relief for violations of the credit advertising provisions [of Part C]." 442 F. 2d at 81. Indeed, the legislative history could not be more clear on this point:

> The bill specifically exempts credit advertising from the application of civil penalties. This exemption has been written into the bill by your committee to avoid the possibility that anyone, not a party to an actual transaction, seeing an advertisement not complying with the disclosure requirements of the bill would attempt to seek civil penalties.

H. Rep. No. 1040, 90th Cong., 2d Sess. (1968), reprinted in 1968 U. S. Code Cong. & Admin. News 1962, 1976.[4] This

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[4] The legislative history raises a colorable question of whether the state law provisions such as Iowa Code § 537.6104(2) have been preempted or must be interpreted as including the same Part C exemption in order to avoid a preemption challenge. On occasion, the Supreme Court has concluded that the preemptive force of a statute is so extraordinary that it "converts an ordinary state common law complaint

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language also prevents courts from implying a cause of action from any Part C provisions. *Jordan*, 442 F. 2d at 82. In two of the five cases, violations of Part C provisions (and violations of subdivisions of Regulation Z derived from Part C) are the only federal law violations described in the complaint. *See State of Iowa ex rel. Miller v. John Kraft Chevrolet*, 87-96-W; *State of Iowa ex rel. Miller v. Dean Rawson Nissan. Inc.*, 87-102-W. Under the logic of *Thompson*, Congress' refusal to create a private cause of action to assert these violations prevents the court from exercising federal subject matter jurisdiction over those actions.[5]

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into one stating a federal claim for purposes of the well-pleaded complaint rule." *Metropolitan Life Insurance Co. v. Taylor*, 107 S. Ct. 1542, 1547 (1987). Although the court recognizes the existence of a preemption issue, it need not address it to resolve the jurisdictional issue because any preemptive effect is not so powerful as to completely supplant the entire area of state law, *see Caterpillar v. Williams*, 107 S. Ct. at 2430, and because federal law does not provide a "superceding remedy replacing the state law cause of action." Utley, 811 F. 2d at 1287.

[5] The court recognizes that Congress intended to permit Part C prohibitions to be enforced in federal court by the Federal Trade Commission. *See* 15 U.S.C. § 1607; *Jordan*, 442 F. 2d at 81. If this were enough to support federal jurisdiction over suits by anyone seeking to enforce Part C, however, the outcome of the *Thompson* case would have been different, because the regulation involved in *Thompson* could also have been enforced in federal court by a federal agency. *See* 106 S. Ct. at 3244 (Brennan, J., dissenting).

Thompson is not as dispositive in the three cases in which the state alleges violations of the leasing advertising provisions in Part E and Regulation M, which are actionable by private citizens at least in theory under 15 U.S.C. § 1640. Congressional intent to permit or not to permit these three suits to proceed in federal court is less clear. However, the leasing advertising allegations appear to be a relatively minor part of these suits. Whether these leasing allegations are sufficient to support federal jurisdiction over each of the three actions is a difficult question, especially in light of the risk of inconsistent judgments which is inherent in keeping three suits while sending two nearly identical ones back to state court. None of the parties have asked for such an approach, even if the law may require it. The *Thompson* court emphasized that courts must apply the well-pleaded complaint rule "with an eye to practicality and necessity," 106 S. Ct. at 3234, and with the nature of the federal interest at stake in mind. *Id.* at 3236, n. 12. *See also Kravitz v. Homeowners Warranty Corp.*, 542 F. Supp. 317, 320 (E.D.Pa. 1982). The minor federal interest in having a federal court resolve the legality of the leasing advertisements is not great enough to outweigh the impracticality of keeping three cases and sending two back to state court. For these reasons the court does not believe the *Thompson* majority would find the presence of the leasing advertising allegations sufficient to raise a *substantial* federal question.

In its recent decision in *Christianson v. Colt Industries Operating Corp.*, the Supreme Court revisited the well-pleaded complaint rule while resolving a jurisdictional

dispute between the Federal Circuit and the Seventh Circuit over a patent case. After analogizing the appellate jurisdiction statute to the federal question jurisdiction statute, Justice Brennan quoted from his pre-*Thompson* opinion for the majority in *Franchise Tax Board:*

> A district court's federal question jurisdiction, we recently explained, extends over "only those cases in which a well-pleaded complaint establishes *either* that federal law creates the cause of action *or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.*" [Citation omitted], in that federal law is a necessary element of one of the well-pleaded claims.

56 U.S.L.W. at 4627 (emphasis added). It should be recalled that the Supreme Court's failure in *Thompson* to apply the underlined language led Justice Brennan to write a strong dissent, so his resurrection of this second form of federal question jurisdiction in *Christianson* was probably not an accident. Because *Christianson* is the Supreme Court's latest word, the court must at least consider whether the plaintiff's "right to relief" in each case "necessarily depends upon resolution of a substantial question of federal law."

In so doing, the court must remember Justice Brennan's slippery distinction between claims and theories. In *Christianson* the defendant argued that the plaintiff's antitrust claims arose under patent law because the plaintiff alleged that the defendant falsely asserted that plaintiffs were violating its trade secrets, when those trade secrets were not protected under state law because the defendant's patents were invalid under federal law. The court held that even if the invalidity of the patent was an

essential element of one of the plaintiffs' monopolization theories, it would not support jurisdiction because that theory was one of several alternative theories contained within each antitrust claim. Because success on the patent issue was therefore not *necessary* to the overall success of either antitrust claim, the claims did not "arise under" patent law.

In the present case, each complaint includes the following paragraph which appears following the list of alleged Truth-in-Lending Act violations:

> The practices set forth in [the previous paragraph] are deceptive and misleading, and therefore also violate the Iowa Consumer Fraud Act, Iowa Code § 714.16(2) (a) (1987) as amended.

The court believes that this paragraph shows that success on the plaintiff's federal theories is not necessary to the overall success of his claims against the car dealers. Rather, plaintiff has his choice of theories, some federal and some nonfederal, and as a matter of logic, he need not establish that federal law has been violated in order to establish that he has a right to enjoin each of the practices he complains of. Thus, even if Justice Brennan has retaken control of the law in this area, such a development would not change the outcome of this case.[6]

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[6] Defendants also assert that these cases fall within this court's jurisdiction under 28 U.S.C. § 1337 over "any act of Congress regulating commerce." However, the jurisdiction created by section 1337 does not extend beyond the limits of the ordinary federal-question jurisdiction statute. *Kravitz*, 542 F. Supp. at 318 n. 1.

II. PERSONAL JURISDICTION

Defendants have moved to dismiss these actions on the theory that no Iowa court – state or federal – has personal jurisdiction over them. They further assert that this court can dismiss these actions even if it finds that the plaintiff's motion to remand is meritorious. However, the authorities cited in support of this approach do not begin to support it. This court must grant the plaintiff's motion to remand because it lacks subject matter jurisdiction over this case, which also means that the defendants' initial action in removing this case to federal court was improvident. Because these cases are presently in the wrong court, this would be the wrong court to address the personal jurisdiction motion. Although it may be more efficient if this court were to address the motions filed here, considerations of efficiency cannot make up for an absence of jurisdiction. For these reasons, the court may not address the motion to dismiss, but leaves it to the Iowa district court to resolve the important questions raised by that motion on remand.

IT IS THEREFORE ORDERED that the plaintiff's motion to remand these matters to state court is granted.

July 12, 1988.

/s/ Donald E. O'Brien, Judge
Donald E. O'Brien, Judge
UNITED STATES DISTRICT COURT

APPENDIX D

IN THE IOWA DISTRICT COURT FOR
POTTAWATTAMIE COUNTY

THE STATE OF IOWA, EX REL., THOMAS J. MILLER, ATTORNEY GENERAL OF IOWA, Plaintiff, vs. DEAN RAWSON NISSAN, INC., and DEAN C. RAWSON in his corporate capacity as President of Dean Rawson Nissan, Inc. EQUITY NO. 58533	EQUITY NO. 58533 EQUITY NO. 58534 EQUITY NO. 58535 EQUITY NO. 58536 EQUITY NO. 58537 ORDER AND RULING ON MOTION TO DISMISS (Filed Apr. 7, 1989)
BAXTER CHRYSLER PLYMOUTH, INC., and TALTON K. ANDERSON in his corporate capacity as President of Baxter Chrysler Plymouth, Inc. EQUITY NO. 58534	
JOHN MARKEL, INC., d/b/a MARKEL FORD, and TIMOTHY S. MARKEL, in his corporate capacity as President of John Markel, Inc., Equity No. 58535	

JOHN KRAFT CHEVROLET, INC., d/b/a JOHN KRAFT CHEVROLET-ISUZU, INC.,

and

JOHN E. KRAFT, in his corporate capacity as President of John Kraft Chevrolet, Inc.,

EQUITY NO. 58536

****

STAN OLSEN PONTIAC, INC., ET AL.,

EQUITY NO. 58537

Defendants.

****

All of these cases were remanded to the Iowa District Court by the U.S. District Court for lack of subject matter jurisdiction. All defendants have filed motions to dismiss on the grounds that the Iowa District Court lacks personal jurisdiction and subject matter jurisdiction. These cases were consolidated for hearing on the motion, with Attorneys Joseph E. Thornton for Rawson, Attorney Michael G. Helms for Baxter, Attorney James D. Sherrets for Markel, Attorney Robert J. Huck for Kraft and Attorney Martin A. Cannon for Olsen present. Assistant Attorneys General William L. Brauch and Linda Thomas Lowe appeared for the plaintiff. The Court has considered the pleadings, affidavits, arguments and all briefs and finds as follows:

1. In this action, the Iowa Attorney General seeks injunctive and compensatory relief from the defendants, who are Nebraska car dealers, claiming their advertising in the Omaha World-Herald in 1987 is misleading and

deceptive, in violation of the Iowa Consumer Credit Code and the Iowa Consumer Fraud Act.

2. Defendants are residents of Nebraska, are Nebraska corporations and do business in Nebraska. No contracts for the sale of automobiles were made in Iowa. Defendants own no property in Iowa. Defendants do no business in Iowa, and defendants do not deliver cars into Iowa. No advertising is placed in Iowa newspapers or with Iowa radio stations.

3. Advertisements in the Omaha World-Herald are required to be identical in all of the seven editions as a matter of Omaha World-Herald policy. In 11/87 the paid circulation of the newspaper was 301,916 on Sunday and 224,269 for the daily, of which 5,700 Sunday and 3,700 daily are subscriptions in Council Bluffs, for a percentage of 1.68 the World-Herald is the only Omaha newspaper published, and to advertise to their principal market in Nebraska, they must advertise in the Omaha World-Herald, which incidentally reaches Iowa residents.

4. Plaintiffs' statistics show that the World-Herald Sunday sales are 288,779, and 33,124 sales are in Iowa, which is 11.5 percent of the total sales; that 27 percent of the Council Bluffs households receive the newspaper. Plaintiffs therefore contend that the defendants seek to serve the Iowa market, benefit from sales to Iowans and can reasonably anticipate being haled into an Iowa court.

5. The narrow question before the Court is whether or not defendants placing ads in a Nebraska newspaper which incidentally is circulated to Iowans is sufficient contact to give the Iowa Courts jurisdiction.

6. The Court has reviewed the various cases cited by counsel and bases its decision largely on *Smalley v. Dewberry*, 379 NW2d 922 (Iowa 1986) and applies the five factors set out therein. The Court is satisfied there is insufficient contact with Iowa to support the exercise of jurisdiction over these nonresident defendants.

Based on the foregoing, the Court sustains the motion to dismiss and now dismisses plaintiffs' petition at plaintiffs' cost in all five cases.

DATED this 6th day of April, 1989.

/s/ Glen M. McGee
GLEN M. MCGEE, JUDGE,
FOURTH JUDICIAL DISTRICT,
STATE OF IOWA

APPENDIX E

§ 714.16

CRIMINAL LAW

714.16 Consumer frauds

1. Definitions:

a. The term "advertisement" includes the attempt by publication, dissemination, solicitation or circulation to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in any merchandise;

b. The term "merchandise" includes any objects, wares, goods, commodities, intangibles, securities, bonds, debentures, stocks, real estate or services;

c. The term "person" includes any natural person or his legal representative, partnership, corporation (domestic and foreign), company, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestui que trust thereof;

d. The term "sale" includes any sale, offer for sale, or attempt to sell any merchandise for cash or on credit.

e. The term "subdivided lands" refers to improved or unimproved land or lands divided or proposed to be divided for the purpose of sale or lease, whether immediate or future, into five or more lots or parcels; provided, however, it does not apply to the leasing of apartments, offices, stores or similar space within an apartment building, industrial building or commercial building unless an undivided interest in the land is granted as a condition precedent to occupying space in said structure.

2. a. The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.

b. The advertisement for sale, lease or rent, or the actual sale, lease, or rental of any merchandise at a price or with a rebate or payment or other consideration to the purchaser which is contingent upon the procurement of prospective customers provided by the purchaser, or the procurement of sales, leases, or rentals to persons suggested by the purchaser, is declared to be an unlawful practice rendering any obligation incurred by the buyer in connection therewith, completely void and a nullity. The rights and obligations of any contract relating to such contingent price, rebate, or payment shall be interdependent and inseverable from the rights and obligations relating to the sale, lease, or rental.

c. It shall be unlawful for any person to advertise the sale of merchandise at reduced rates due to the cessation of business operations and after the date of the first such advertisement remain in business under the same, or substantially the same, ownership, under the same, or substantially the same trade name, or continue to offer for sale the same type of merchandise at the same location for more than one hundred twenty days.

d. (1) No person shall offer or advertise within this state for sale or lease, any subdivided lands without first filing with the real estate commission, true and accurate copies of all road plans, plats, field notes and diagrams of water, sewage and electric power lines as they exist at the time of such filing, provided such filing shall not be required for a subdivision subject to section 306.21 or chapter 409. Each such filing shall be accompanied by a fee of fifty dollars for each subdivision included, payable to the real estate commission.

(2) False or misleading statements filed pursuant to subparagraph 1 of paragraph "d" of this subsection or section 306.21 or chapter 409, and advertising, offers to sell, or contracts not in substantial conformity with the filings made pursuant to section 306.21 or chapter 409 are unlawful.

e. Any violations of chapter 123 or any other provisions of law by a manufacturer, distiller, vintner, importer, or any other person participating in the distribution of alcoholic liquor or beer as defined in chapter 123.

3. When it appears to the attorney general that a person has engaged in, is engaging in, or is about to engage in any practice declared to be unlawful by this section or when he believes it to be in the public interest that an investigation should be made to ascertain whether a person in fact has engaged in, is engaging in or is about to engage in, any such practice, he may:

a. Require such person to file on such forms as he may prescribe a statement or report in writing under oath or otherwise, as to all the facts and circumstances concerning the sale or advertisement of merchandise by such

person, and such other data and information as he may deem necessary;

b. Examine under oath any person in connection with the sale or advertisement of any merchandise;

c. Examine any merchandise or sample thereof, record, book, document, account or paper as he may deem necessary; and

d. Pursuant to an order of a district court impound any record, book, document, account, paper, or sample of merchandise that is produced in accordance with this section, and retain the same in his possession until the completion of all proceedings in connection with which the same are produced.

4. a. To accomplish the objectives and to carry out the duties prescribed by this section, the attorney general, in addition to other powers conferred upon him by this section, may issue subpoenas to any person, administer an oath or affirmation to any person, conduct hearings in aid of any investigation or inquiry, prescribed such forms and promulgate such rules as may be necessary, which rules shall have the force of law.

b. No information or evidence provided the attorney general by a person pursuant to subsections 3 and 4 of this section shall be admitted in evidence, or used in any manner whatsoever, in any criminal prosecution. If a criminal prosecution under the provisions of this section is initiated in a state court against a person who has provided information pursuant to subsections 3 and 4 of this section, the state shall have the burden of proof that

the information so provided was not used in any manner to further the criminal investigation or prosecution.

c. In any civil action brought pursuant to this chapter, the attorney general shall have the right to require any defendant to give testimony, and no criminal prosecution based upon transactions or acts about which he is questioned and required to give testimony shall thereafter be brought against such defendant.

5. Service by the attorney general of any notice requiring a person to file a statement or report, or of a subpoena upon any person, shall be made personally within this state, but if such cannot be obtained, substituted service therefore may be made in the following manner:

a. Personal service thereof without this state; or

b. The mailing thereof by registered mail to the last known place of business, residence or abode within or without this state of such person for whom the same is intended; or

c. As to any person other than a natural person, in the manner provided in the Rules of Civil Procedure as if a petition had been filed; or

d. Such service as a district court may direct in lieu of personal service within this state.

6. If any person fails or refuses to file any statement or report, or obey any subpoena issued by the attorney general, the attorney general may, after notice, apply to a district court and, after hearing thereof, request an order:

a. Granting injunctive relief, restraining the sale or advertisement of any merchandise by such persons;

b. Dissolving a corporation created by or under the laws of this state or revoking or suspending the certificate of authority to do business in this state of a foreign corporation or revoking or suspending any other licenses, permits or certificates issued pursuant to law to such person which are used to further the allegedly unlawful practice; and

c. Granting such other relief as may be required; until the person files the statement or report, or obeys the subpoena.

7. Whenever it appears to the attorney general that a person has engaged in, is engaging in or is about to engage in any practice declared to be unlawful by this section he may seek and obtain in an action in a district court an injunction prohibiting such person from continuing such practices or engaging therein or doing any acts in furtherance thereof. The court may make such orders or judgments as may be necessary to prevent the use or employment by a person of any prohibited practices, or which may be necessary to restore to any person in interest any moneys or property, real or personal which may have been acquired by means of any practice in this section declared to be unlawful including the appointment of a receiver in cases of substantial and willful violation of the provisions of this section.

8. When a receiver is appointed by the court pursuant to this section, he shall have the power to sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands

and tenements, books, records, documents, papers, choses in action, bills, notes and property of every description, derived by means of any practice declared to be illegal and prohibited by this section, including property with which such property has been mingled if it cannot be identified in kind because of such commingling, and to sell, convey, and assign the same and hold and dispose of the proceeds thereof under the direction of the court. Any person who has suffered damages as a result of the use or employment of any unlawful practices and submits proof to the satisfaction of the court that he has in fact been damaged, may participate with general creditors in the distribution of the assets to the extent he has sustained out-of-pocket losses. In the case of a partnership or business entity, the receiver shall settle the estate and distribute the assets under the direction of the court. The court shall have jurisdiction of all questions arising in such proceedings and may make such orders and judgments therein as may be required.

9. Subject to an order of the court terminating the business affairs of any person after receivership proceedings held pursuant to this section, the provisions of this section shall not bar any claim against any person who has acquired any moneys or property, real or personal, by means of any practice herein declared to be unlawful.

10. In any action brought under the provisions of this section, the attorney general is entitled to recover costs for the use of this state.

11. If any provision of this section or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions of applications

of the section which can be given effect without the invalid provision or application and to this end the provisions of this section are severable.

12. Nothing contained in this section shall apply to the owner or publisher of newspapers, magazines, publications or printed matter wherein such advertisement appears, or to the owner or operator of a radio or television station which disseminates such advertisement when the owner, publisher or operator has no knowledge of the intent, design or purpose of the advertiser; and provided, further, that nothing herein contained shall apply to any advertisement which complies with the rules and regulations of, and the statutes administered by the federal trade commission.

This section was not enacted as part of the Criminal Code but was transferred here from section 713.24, Code 1977.

PART 2. SCOPE AND JURISDICTION

537.1201. Territorial application

1. This chapter applies to:

a. A transaction, or acts, practices or conduct with respect to a transaction, if the transaction is entered into in this state, except that a transaction involving other than open end credit or acts, practices or conduct with respect to such a transaction shall not subject any person to damages or penalty under article 5 of this chapter, or administrative enforcement under article 6, part 1.

(1) If the buyer, lessee or debtor was physically located outside of this state, at the time the buyer, lessee or debtor signed the writing evidencing the transaction or made, in face-to-face solicitation, a written or oral offer to enter into the transaction,

(2) If the transaction or acts, practices or conduct with respect to the transaction were not in violation of law in the state in which the buyer, lessee or debtor was physically located, and

(3) If, with respect to charges and agreements, the person does not collect or enforce that transaction except to the extent permitted by this chapter.

b. A transaction, or acts, practices or conduct with respect to a transaction, if it is modified in this state, without regard to where the transaction is entered into, except that acts, practices, conduct, disclosures, charges or provisions of agreements not in violation of law in the state where they occurred or were entered into, shall not subject any person to damages or penalty under article 5 or administrative enforcement under article 6, part 1, if, with respect to acts, practices, conduct or disclosures, they occurred outside this state and before a modification in this state, and if, with respect to charges and agreements, they are not collected or enforced by that person except to the extent permitted by this chapter. A person shall not be required to obtain a license under section 537.2301, solely because the person modifies a transaction in this state.

c. Acts, practices or conduct in this state in the solicitation, inducement, negotiation, collection or enforcement of a transaction, without regard to where it

is entered into or modified; including, but not limited to, acts, practices or conduct in violation of sections 537.3209, 537.3210, 537.3311, 537.3501, article 5, parts 1 and 3, and article 7.

2. For the purposes of this section, a transaction is entered into or modified in this state if any of the following apply:

a. In a transaction involving other than open end credit:

(1) If the buyer, lessee or debtor is a resident of this state at the time the person extending credit solicits the transaction or modification, whether personally, by mail or by telephone, unless the parties have agreed that the law of the residence of the buyer, lessee or debtor applies, in which case that law applies.

(2) If the buyer, lessee or debtor is a resident of this state at the time the person extending credit receives either a signed writing evidencing the transaction or modification, or a written or oral offer of the buyer, lessee or debtor to enter into or modify the transaction.

(3) If the transaction otherwise has significant contacts with this state, unless the buyer, lessee or debtor is not a resident of this state at the times designated in subsection 2, paragraph "a", subparagraphs (1) and (2) and the parties have agreed that the law of the buyer's, lessee's, or debtor's residence applies. A person shall not be required to obtain a license under section 537.2301 solely because this chapter applies to a transaction pursuant to this subparagraph.

b. In an open and credit transaction:

(1) If the buyer, lessee or debtor is a resident of this state either at the time the buyer, lessee or debtor forwards or otherwise gives to the person extending credit a written or oral communication of the intention to establish the open end transaction, or at the time the person extending credit forwards or otherwise gives to the buyer, lessee or debtor a written or oral communication giving notice to the buyer, lessee or debtor of the right to enter into open end transactions with such person, unless the parties have agreed that the law of the residence of the buyer, lessee or debtor applies in which case that law shall apply.

(2) If the transaction otherwise has significant contacts with this state, unless the buyer, lessee or debtor is not a resident of this state at the times designated in subsection 2, paragraph "a", subparagraph (1) and the parties have agreed that the law of the buyer's, lessee's, or debtor's residence applies. A person shall not be required to obtain a license under section 537.2301 solely because this chapter applies to a transaction pursuant to this subparagraph.

c. In any credit transaction, if the parties have agreed that the law of the residence of the buyer, lessee or debtor applies and the buyer, lessee or debtor is a resident of this state at any time designated, with respect to a transaction other than open end, in subsection 2, paragraph "a", subparagraphs (1) and (2) or, with respect to an open end credit transaction, in subsection 2, paragraph "b", subparagraph 1.

3. For the purposes of this section, "modification" shall include, but not be limited to, any alteration in the maturity, schedule of payments, amount financed, rate of finance charge or other term of a transaction.

4. For the purposes of this chapter, the residence of a buyer, lessee or debtor is the address given by that person as the person's residence in a writing signed by the person in connection with a transaction until the person notifies the person extending credit of a different address as the person's residence, and it is then the different address.

5. Except as provided in subsection 1, paragraph "c", and subsection 6, a transaction entered into or modified in another jurisdiction is valid and enforceable in this state according to its terms to the extent that it is valid and enforceable under the laws of the other jurisdiction.

6. A provision of an agreement made by a buyer, lessee or debtor is invalid:

a. Which provides, if the buyer, lessee or debtor is a resident of this state at the times designated in subsection 2, paragraph "a", subparagraphs (1) and (2) and subsection 2, paragraph "b", subparagraph (1):

(1) That the law of another jurisdiction shall apply, except as provided in subsection 2, paragraph "a", subparagraph (1) and in subsection 2, paragraph "b", subparagraph (1).

(2) That the buyer, lessee or debtor consents to be subject to the process of another jurisdiction.

(3) That the buyer, lessee or debtor appoints an agent to receive service of process.

(4) That venue is fixed at a particular place.

(5) That the consumer consents to the jurisdiction of a court that does not otherwise have jurisdiction.

b. If a provision would negate subsection 1, paragraph "b".

7. The following provisions of this chapter specify the applicable law governing certain cases:

a. Section 537.6102 specifies the applicability of article 6, part 1.

b. Section 537.6201 specifies the applicability of article 6, part 2. Acts 1974 (65 G.A.) ch. 1250, § 1.201.

537.1203. Jurisidiction – service of process

1. The district court of this state may exercise jurisdiction over any person with respect to any conduct in this state governed by this chapter or with respect to any claim arising from a transaction subject to this chapter. In addition to any other method provided by rule or by statute, and of any separate agreement of obligation signed by the person entitled to the notice.

Acts 1974 (65 G.A.) ch. 1250, § 3.208.

537.3209. Advertising

1. A seller, lessor, or lender shall not advertise, print, display, publish, distribute, utter or broadcast, or cause to be advertised, printed, displayed, published, distributed, uttered or broadcast in any manner, any false, misleading, or deceptive statement or representation with regard to the rates, terms or conditions of credit with respect to a consumer credit transaction.

2. Advertising that complies with the Truth in Lending Act does not violate this section.

3. This section does not apply to the owner or personnel, as such, of any medium in which an advertisement appears or through which it is disseminated.

Acts 1974 (65 G.A.) ch. 1250, § 3.209.

537.6103. Administrator

Except as expressly provided in sections 537.6106 and 537.6108, "administrator" means the attorney general or the attorney general's designee.

Acts 1974 (65 G.A.) ch. 1250, § 6.103.

537.6104. Powers of administrator – reliance on rules – duty to report.

1. The administrator, within the limitations provided by law, may:

a. Receive and act on complaints.

b. Take action designed to obtain voluntary compliance with this chapter.

c. Commence proceedings on the administrator's own initiative.

d. Counsel persons and groups on their rights and duties under this chapter.

e. Establish programs for the education of consumers with respect to credit practices and problems.

f. Make studies appropriate to effectuate the purposes and policies of this chapter and make the results available to the public.

g. Maintain offices within this state.

2. The administrator may enforce the Truth in Lending Act to the fullest extent provided by law.

3. To keep the administrator's rules in harmony with the rules of administrators in other jurisdictions which enact the uniform consumer credit code, the administrator, so far as is consistent with the purposes, policies and provisions of this chapter, shall do both of the following:

a. Before adopting, amending and repealing rules, advise and consult with administrators in other jurisdictions which enact the uniform consumer credit code.

b. In adopting, amending, and repealing rules, take into consideration the rules of administrators in other jurisdictions which enact the uniform consumer credit code.

4. Except for refund of an excess charge, no liability is imposed under this chapter for an act done or omitted in conformity with a rule of the administrator notwithstanding that after the act or omission the rule is amended or repealed or determined by judicial or other authority to be invalid for any reason.

5. The administrator shall report annually on or before January 1 to the general assembly on the operation of the consumer credit protection bureau and the other agencies of this state charged with administering this chapter, on the use of consumer credit in the state, and on the problems of persons of small means obtaining credit from persons regularly engaged in extending sales or loan credit. For the purpose of making the report, the administrator may conduct research and make appropriate studies. The report shall include, for the consumer credit protection bureau and for other state agencies enforcing this chapter, a description of the examination and investigation procedures and policies, a statement of policies followed in deciding whether to investigate or examine the offices of credit suppliers subject to this chapter, a statement of the number and percentages of offices which are periodically investigated or examined, a statement of the types of consumer credit problems of both creditors and consumers which have come to the administrator's attention through the administrator's examinations and investigations and the disposition of them under existing law, and recommendations, if any, for legislation to deal with those problems within the administrator's general jurisdiction, a statement of the extent to which the rules of the administrator pursuant to

this chapter are not in harmony with the rules of administrators in other jurisdictions which enact the uniform consumer credit code and the reasons for the variations, and a general statement of the activities of the administrator's office and of others to promote the purposes of this chapter. The report shall not identify the creditors against whom action is taken.

Acts 1974 (65 G.A.) ch. 1860, § 6.104.

537.6110. Injunctions and other proceedings in equity

The administrator may bring a civil action to restrain a person from violating this chapter and for other appropriate relief, including but not limited to the following:

a. To prevent the use or employment by a person of practices prohibited by this chapter.

b. To reform contracts to conform to this chapter and to rescind contracts into which a creditor has induced a consumer to enter by conduct violating this chapter, even though the consumers are not parties to the action. An action under this section may be joined with an action under the provisions on civil actions by the administrator under section 537.6113.

Acts 1974 (65 G.A.) ch. 1250 § 6.110.

537.6112. Temporary relief

With respect to an action brought to enjoin violations of this chapter under section 537.6110 or unconscionable agreements or fraudulent or unconscionable conduct under section 537.6111, the administrator may apply to the court for appropriate temporary relief against a defendant, pending final determination of the action. The court may grant appropriate temporary relief.

Acts 1974 (65 G.A.) ch. 1250, § 6.112.

537.6113. Civil actions by administrator

1. After demand, the administrator may bring a civil action against a person for all amounts of money, other than penalties, which a consumer or class of consumers has a right to recover explicitly granted by this chapter. The court shall order amounts recovered or recoverable under this subsection to be paid to each consumer or set off against the consumer's obligation. A consumer's action, other than a class action, takes precedence over a prior or subsequent action by the administrator with respect to the claim of that consumer. A consumer's class action takes precedence over a subsequent action by the administrator with respect to claims common to both actions but intervention by the administrator is authorized. An administrator's action on behalf of a class of consumers takes precedence over a consumer's subsequent class action with respect to claims

common to both actions. Whenever an action takes precedence over another action under this subsection, the latter action may be stayed to the extent appropriate while the precedent action is pending and dismissed if the precedent action is dismissed with prejudice or results in a final judgment granting or denying the claim asserted in the precedent action. A defense available to a person in a civil action brought by a consumer is available to the person in a civil action brought under this subsection.

2. The administrator may bring a civil action against a person to recover a civil penalty of no more than five thousand dollars for repeatedly and intentionally violating this chapter. No civil penalty pursuant to this subsection may be imposed for violation of this chapter occurring more than two years before the action is brought or for making unconscionable agreements or engaging in a course of fraudulent or unconscionable conduct.

3. The administrator may bring a civil action against a person for failure to file notification in accordance with the provisions on notification in section 537.6202, or to pay fees in accordance with the provisions on fees in section 537.6203, to recover the fees the defendant has failed to pay plus interest at the rate of seven percent per annum and the administrator's reasonable costs in bringing the action, and a civil penalty in an amount determined by the court not exceeding the greater of three times the amount of fees the person has failed to pay or one thousand dollars.

Acts 1974 (65 G.A.) ch. 1250, § 6.113.